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Pluralism in Theories of Liability: Joint Criminal Enterprise versus Joint Perpetration^{*}

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3.1 INTRODUCTION

From the start of their operation, the *ad hoc* Tribunals and the International Criminal Court (ICC) have been engaged in a ‘continuous quest’¹ for theories of liability that can adequately address the systemic character of international crimes. Moreover, the courts have sought to express the central role played by senior political and military leaders in the commission of these crimes. To this end, the *ad hoc* Tribunals and the ICC have used the doctrines of joint criminal enterprise (JCE) and (indirect) joint perpetration, respectively. Both JCE and joint perpetration base criminal responsibility on the existence of a common plan between the accused and others leading to the commission of crimes. Yet, the *ad hoc* Tribunals and the ICC continue to emphasise the distinctive nature of these doctrines: ‘there is an unwillingness on either side to uncover similarities and overlap between co-perpetration and JCE, let alone apply each other’s case law with regard to these concepts’.² The Tribunals and the ICC thus each pursue a course of *Alleingang*.

The ICC explains and justifies its *Alleingang* most explicitly with reference to the different rationales underlying JCE and joint perpetration. Whereas joint perpetration is thought to reflect an objective rationale, JCE is perceived to be premised on a subjective one. The distinction between these rationales lies in their focus of attention. The objective rationale takes as a starting point the acts and conduct of the accused (*actus reus*). A person is criminally responsible when he or she makes an essential contribution to a crime and in that sense *controls* its commission.³ The subjective rationale, conversely, emphasises the accused’s *mens rea* and grounds criminal responsibility on the fact that the accused shared with others the *intent* to implement a common criminal purpose.⁴

The validity of the dichotomy between JCE and joint perpetration remains as yet uncertain. There is a division between scholars who affirm and welcome the ICC’s approach⁵ and those who critically question the Court’s distinctive

1 H. van der Wilt, ‘The Continuous Quest for Proper Modes of Liability’, 7 *Journal of International Criminal Justice* (2009) 307.

2 E. van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press, 2012) 101.

3 *Prosecutor v. Lubanga*, Decision on the confirmation of charges, Case No. ICC-01/04-01/06-803, Pre-Trial Chamber I, 29 January 2007 (*Lubanga* confirmation of charges decision), paras. 330, 338.

4 *Lubanga* confirmation of charges decision, para. 329.

5 See e.g. S. Wirth, ‘Committing Liability in International Criminal Law’ in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff Publishers, 2009) 329, 331-333; H. Olásolo, ‘Current Trends on Modes of Liability for Genocide, Crimes against Humanity and War Crimes’ in C. Stahn and L. van den Herik (eds.), *Future Perspectives on International Criminal Justice* (The Hague: T.M.C. Asser Press, 2010) 520, 526-528; S. Manacorda and C. Meloni, ‘Indirect Perpetration versus Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law?’, 9 *Journal of International Criminal Justice* (2011) 159, 161-163; C. Meloni, ‘Fragmentation of the Notion of

course.⁶ I would like to add a new voice to this debate by having a look ‘beneath the surface’ of the courts’ allegedly different theories of liability. In particular, I seek to assess how the *ad hoc* Tribunals and the ICC have applied the law to the facts and use this assessment as a basis for determining whether there is a dichotomy between joint perpetration and JCE in practice.

My argument develops as follows. Section 2 explores the current status of the legal debate on the (different) rationales underlying JCE and joint perpetration. In this respect, particular attention is paid to the meaning of the common plan-element, which is the most characteristic feature of these liability doctrines that forms the central basis of attribution. Sections 3 and 4 assess the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY)⁷ and the ICC, respectively. In particular, these sections set out to identify, categorise, and interpret the factual circumstances that are used to establish the common plan-element in individual cases. Based on this assessment, section 5 concludes that the ICC and ICTY both perceive the common plan as a collective element that is based on the participants’ cooperation in, and their informed contribution to, (criminal) organisations. Thus, the courts apply the common plan-element in an essentially similar manner. Considering that the common plan-element is the central basis of attribution for JCE and joint perpetration, this finding implies that the alleged objective–subjective dichotomy between JCE and joint perpetration is nominal rather than actual. The dichotomy should therefore not engross future debates on theories of liability in international criminal law. Rather than stressing the differences between JCE and joint perpetration, it is more fruitful to focus on the similarities between these doctrines. In this light, section 6 draws an analogy with domestic theories of criminal responsibility for (co-)perpetration and participation in a criminal organisation. This

Co-Perpetration in International Criminal Law?’ in L. van den Herik and C. Stahn (eds.), *The Diversification and Fragmentation of International Criminal Law* (Leiden: Martinus Nijhoff Publishers, 2012) 481, 501; F. Jessberger and J. Geneuss, ‘On the Application of a Theory of Indirect Perpetration in *Al-Bashir*’, 6 *Journal of International Criminal Justice* (2008) 853, 858; K. Ambos, ‘The *Fujimori* Judgment – A President’s Responsibility for Crimes against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus’, 9 *Journal of International Criminal Justice* (2011) 137, 158; G. Werle and B. Burghardt, ‘Foreword’, 9 *Journal of International Criminal Justice* (2011) 85, 88; G. Fletcher, ‘New Court, Old Dogmatik’, 9 *Journal of International Criminal Justice* (2011) 179, 190; Van der Wilt (n. 1 above) 308–310.

6 E.g. J.D. Ohlin, ‘Joint Intentions to Commit International Crimes’, 11 *Chicago Journal of International Law* (2010–2011) 693, 745; V. Haan, *Joint Criminal Enterprise: Die Entwicklung einer Mittäterschaftlichen Zurechnungsfigur im Völkerstrafrecht* (Berlin: Duncker & Humblot, 2008) 109, 162–163, 199; T. Weigend, ‘Intent, Mistake of Law and Co-Perpetration in the *Lubanga* Decision on Confirmation of Charges’, 6 *Journal of International Criminal Justice* (2008) 471, 476–478; K. Ambos, ‘Amicus Curiae Brief in the Matter of the Co-Prosecutors’ Appeal of the Closing Order against Kaing Guek Eav “Duch” Dated 8 August 2008’, 20 *Criminal Law Forum* (2009) 353, 363–364; Van Sliedregt (n. 2 above) 101, 170–171.

7 The practice of the ICTR falls outside the scope of this chapter because its case law on JCE is limited and adds little to the ICTY’s extensive jurisprudence.

analogy can help to develop a better confined and intellectually more honest concept of criminal responsibility for international crimes.

3.2 THE DEBATE ON JCE AND JOINT PERPETRATION

3.2.1 *Subjective versus Objective Rationale*

International crimes are forms of system criminality.⁸ System criminality concerns the widespread commission of crimes by multiple cooperating (groups of) persons.⁹ It also presupposes the involvement of a senior military and/or political leader who masterminds the collective action from a distance. To ensure the criminal responsibility of these senior leaders (who did not commit any crimes physically), the ICTY uses the concept of JCE.¹⁰ This concept enables the imputation of ‘certain acts or results to persons for their participation in a collective (“joint”) *criminal enterprise*’.¹¹ The criminal enterprise is defined by the participants’ common agreement or understanding to commit crimes.¹² For example, the JCE charges against Radovan Karadžić are based on the allegation that

8 See e.g. A. Nollkaemper, ‘Introduction’ in A. Nollkaemper and H. van der Wilt (eds.), *System Criminality in International Law* (Cambridge: Cambridge University Press, 2009) 1, 1-2; Van Sliedregt (n. 2 above) 20-22; Haan (n. 6 above) 35-42.

9 See e.g. K. Ambos, ‘Article 25: Individual Criminal Responsibility’ in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observers’ Notes, Article by Article* (München: C.H. Beck oHG, 2008) 744, 748; A. Cassese, ‘The Proper Limits of Individual Criminal Responsibility under the Doctrine of Joint Criminal Enterprise’, 5 *Journal of International Criminal Justice* (2007) 109, 110; G. Werle, ‘Individual Criminal Responsibility in Article 25 ICC Statute’, 5 *Journal of International Criminal Justice* (2007) 953, 953-954; Jessberger and Geneuss (n. 5 above) 855; Haan (n. 6 above) 35-42; Nollkaemper (n. 8 above) 1-2.

10 Since the *Tadić* Appeals Chamber judgment, the objective elements (*actus reus*) of this mode of liability have been formulated as follows: (i) a plurality of persons; (ii) a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute; and (iii) the accused’s participation in the common criminal design. See *Prosecutor v. Tadić*, Judgment, Case No. IT-94-1-A, Appeals Chamber, 15 July 1999 (*Tadić* Appeals Chamber judgment), para. 227. The *mens rea* element of JCE differs according to the category of common design: ‘With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators). With regard to the second category (...), personal knowledge of the system of ill-treatment is required (...), as well as the intent to further this common concerted system of ill-treatment. With regard to the third category, what is required is the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.’ *Tadić* Appeals Chamber judgment, para. 228.

11 Ambos (n. 6 above) 353, 360.

12 K. Ambos, *Treatise on International Criminal Law, Volume 1: Foundations and General Part* (Oxford: Oxford University Press, 2013) 160.

he shared with *inter alia* Slobodan Milošević and Ratko Mladić the objective to forcibly and violently remove the non-Serb inhabitants from the Bosnian Serb-claimed territories of Bosnia-Herzegovina.¹³ In this way, JCE allegedly gives expression to a subjective notion of criminal responsibility.¹⁴ The essence of wrongdoing lies in the JCE members' shared intent to implement a common criminal purpose,¹⁵ rather than in their objective contribution to this criminal purpose. The *actus reus* is merely secondary.¹⁶

The ICC has explicitly dissociated itself from the JCE concept and has adopted the concept of joint perpetration instead. According to the Court, joint perpetration

is rooted in the principle of the division of essential tasks for the purpose of committing a crime between two or more persons acting in a concerted manner. Hence, although none of the participants has overall control over the offence because they all depend on each other for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task.¹⁷

In this way, the ICC takes the accused's ability to dominate the commission of crimes – i.e. to decide whether and how the crime will be committed – as a starting-point.¹⁸ It bases the criminal responsibility of joint perpetrators on their performance of essential

13 *Prosecutor v. Karadžić*, Third amended indictment, Case No. IT-95-5/18-PT, 27 February 2009, paras. 6-13.

14 *Lubanga* confirmation of charges decision, paras. 329, 335, 338.

15 B. Goy, 'Individual Criminal Responsibility before the International Criminal Court: A Comparison with the *ad hoc* Tribunals', 12 *International Criminal Law Review* (2012) 1, 29.

16 See also C. Damgaard, *Individual Criminal Responsibility for Core International Crimes* (Berlin: Springer, 2008) 207-208; K. Gustafson, 'The Requirement of an Express Agreement for Joint Criminal Enterprise Liability: A Critique of *Brdanin*', 5 *Journal of International Criminal Justice* (2007) 134, 138; H. Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Oxford: Hart Publishing, 2009) 5; Olásolo (n. 5 above) 527-528; Cassese (n. 9 above) 116.

17 *Lubanga* confirmation decision, para. 342. The legal elements of this mode of liability are formulated as follows: (i) a common plan or agreement between two or more persons that, once implemented, will result in the commission of a crime in the ordinary course of events; (ii) the essential contribution of each joint perpetrator to the common plan; (iii) the accused's fulfilment of the subjective elements of the crime; (iv) the joint perpetrators' (mutual) awareness and acceptance that the implementation of their common plan will result in the commission of the crime; and (v) the accused's awareness that he provided an essential contribution to the common plan. See *Prosecutor v. Lubanga*, Judgment, Case No. ICC 01/04-01/06-2842, Trial Chamber I, 14 March 2012 (*Lubanga* Trial Chamber judgment), paras. 980-1018.

18 E.g. *Prosecutor v. Katanga and Ngudjolo Chui*, Decision on the confirmation of charges, Case No. ICC-01/04-01/07, Pre-Trial Chamber I, 30 September 2008 (*Katanga and Chui* confirmation of charges decision), para. 485; *Prosecutor v. Banda and Jerbo*, Corrigendum of the 'Decision on the confirmation of charges', Case No. ICC-02/05-03/09-121-Corr-Red, Pre-Trial Chamber I, 7 March 2011 (*Banda and Jerbo* confirmation of charges decision), para. 126; *Lubanga* Trial Chamber judgment, paras. 920, 922; *Lubanga* confirmation of charges decision, para. 330.

tasks, rather than on their agreement to a common criminal plan.¹⁹ This is found to reflect an objective ‘control over the crime’ approach.²⁰

The distinction between the subjective JCE concept and the objective joint perpetration concept has been subject to different assessments. Some scholars endorse the ICC’s finding that JCE and joint perpetration are premised on different rationales and welcome the Court’s rejection of the subjective rationale underlying JCE.²¹ For example, according to Chouliaras, the subjective rationale ‘permits both prosecutors and judges to use JCE as an open-ended category, vesting their intuition with a legal veil’.²² As a consequence, JCE obscures the link between the accused and the crimes for which he stands trial: it ‘remain[s] rather elusive as to how the suspect has exactly contributed to the crimes’.²³ The objective rationale underlying joint perpetration allegedly remedies this defect by defining the participants’ contributions to a criminal endeavour more precisely.²⁴

By contrast, other scholars consider the distinction between JCE and joint perpetration as contrived.²⁵ While acknowledging that JCE and joint perpetration place different

19 Goy (n. 15 above) 41.

20 E.g. *Lubanga* confirmation of charges decision, paras. 330, 331, 340; *Katanga and Chui* confirmation of charges decision, paras. 480-486; *Banda and Jerbo* confirmation of charges decision, para. 126; *Prosecutor v. Bemba Gombo*, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean Pierre Bemba Gombo, Case No. ICC-01/05-01/08-424, Pre-Trial Chamber II, 15 June 2009 (*Bemba* confirmation of charges decision), para. 296; *Prosecutor v. Muthaura et al.*, Decision on the confirmation of charges pursuant to Article 61(7)(a) and (b) of the Rome Statute, Case No. ICC-01/09-02/11-382-Red, Pre-Trial Chamber II, 23 January 2012 (*Muthaura et al.* confirmation of charges decision), para. 296; *Prosecutor v. Ruto et al.*, Decision on the confirmation of charges pursuant to Article 61(7)(a) and (b) of the Rome Statute, Case No. ICC-01/09-01/11-373, Pre-Trial Chamber II, 23 January 2012 (*Ruto et al.* confirmation of charges decision), para. 291.

21 E.g. Van der Wilt (n. 1 above) 308-310; Wirth (n. 5 above) 331-333; Olásolo (n. 5 above) 526-528; Manacorda and Meloni (n. 6 above) 161-163; Meloni (n. 5 above) 487, 492, 501; Jessberger and Geneuss (n. 5 above) 858.

22 A. Chouliaras, ‘From “Conspiracy” to “Joint Criminal Enterprise”’: In Search of the Organizational Parameter’ in C. Stahn and L. van den Herik (eds.), *Future Perspectives on International Criminal Justice* (The Hague: T.M.C. Asser Press, 2010) 545, 577.

23 Van der Wilt (n. 1 above) 308. See also E. van Sliedregt, ‘System Criminality at the ICTY’ in A. Nollkaemper and H. van der Wilt (eds.), *System Criminality in International Law* (Cambridge: Cambridge University Press, 2009) 183, 183-184; H. van der Wilt, ‘Joint Criminal Enterprise and Functional Perpetration’ in A. Nollkaemper and H. van der Wilt (eds.), *System Criminality in International Law* (Cambridge: Cambridge University Press, 2009) 158, 163-164, 166; V. Haan, ‘The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the former Yugoslavia’, 5 *International Criminal Law Review* (2005) 167, 195; G. Boas, ‘The Difficulty with Individual Criminal Responsibility in International Criminal Law’ in C. Stahn and L. van den Herik (eds.), *Future Perspectives on International Criminal Justice* (The Hague: T.M.C. Asser Press, 2010) 501, 511-515; Olásolo (n. 5 above) 528-529; Chouliaras (n. 22 above) 577.

24 Meloni (n. 5 above) 501. See also Van der Wilt (n. 1 above) 308.

25 E.g. Van Sliedregt (n. 2 above) 101, 170-171; Ohlin (n. 6 above) 745; Haan (n. 6 above) 109, 162-163, 199; Weigend (n. 6 above) 476-478. While Ambos seems to have adopted a similar understanding of the relation between JCE and joint perpetration, he still maintains that a characterisation of JCE and joint perpetration in terms of their subjective or objective rationales is possible and useful. Ambos (n. 12 above) 162-163.

emphases, they argue that the legal elements and principles of attribution of these theories of liability largely overlap. Ohlin, for example, recalls that JCE and joint perpetration both require a common plan or agreement. In this light, he finds that joint perpetration, like JCE, encompasses a subjective notion of shared intentions.²⁶ Haan adds that the ICTY's assessment of the common plan-element takes account of the JCE members' coordinated cooperation and thus incorporates objective elements into the JCE concept.²⁷ These observations show that the scholars who reject or question the subjective-objective dichotomy between JCE and joint perpetration perceive the common plan as a unifying element that brings these theories of liability closer together. It introduces a subjective notion into the joint perpetration concept and includes features that objectify JCE. Considering this potentially unifying role, the next section analyses the nature of the common plan-element further.

3.2.2 *Characterising the Common Plan*

The common plan-element is often characterised as the 'distinctive feature' and 'most fundamental component' of JCE and joint perpetration.²⁸ The nature of this element, however, remains uncertain.²⁹ In particular, the way in which it links the participants to each other and to the crimes committed is rather ambiguous. Traditionally, the common plan is interpreted as an agreement, a common act of volition,³⁰ or a 'meeting of minds'.³¹ This interpretation makes the existence of a common plan subject to the

26 Ohlin (n. 6 above) 745.

27 Haan (n. 6 above) 162-163, 199. Similarly, Chouliaras (n. 22 above) 576.

28 E.g. K. Ambos, 'Joint Criminal Enterprise and Command Responsibility', 5 *Journal of International Criminal Justice* (2007) 159, 167; E. van Sliedregt, 'JCE as a Pathway to Convicting Individuals for Genocide', 5 *Journal of International Criminal Justice* (2007) 184, 201; A. Eser, 'Individual Criminal Responsibility' in A. Cassese et al. (eds.), *The Rome Statute for an International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) 780, 792; Van Sliedregt (n. 2 above) 133, 136; Haan (n. 6 above) 238; Werle (n. 9 above) 958; Ambos (n. 9 above) 748; Ambos (n. 12 above) 149; Olásolo (n. 16 above) 169. See also *Prosecutor v. Brđanin*, Judgment, Case No. IT-99-36-A, Appeals Judgment, 3 April 2007 (*Brđanin* Appeals Chamber judgment), para. 418; *Lubanga* confirmation of charges decision, para. 362.

29 Ambos (n. 12) 151.

30 See e.g. K. Ambos, 'Critical Issues in the Bemba Confirmation Decision', 22 *Leiden Journal of International Law* (2009) 715, 721; Ambos (n. 5 above) 146; Werle (n. 9 above) 958; Olásolo (n. 16 above) 169, 275; Cassese (n. 9 above) 111; Haan (n. 23 above) 180; Eser (n. 28 above) 791, 793.

31 See e.g. Van Sliedregt (n. 2 above) 101; Weigend (n. 6 above) 481; Olásolo (n. 16 above) 275; *Prosecutor v. Lubanga*, Separate opinion Judge Adrian Fulford, Case No. ICC-01/04-01/06-2842, 14 March 2012 (Separate opinion Judge Fulford), para. 15; cf G. Jakobs, *Strafrecht Allgemeiner Teil: Die Grundlagen und die Zurechnungslehre* (Berlin: De Gruyter, 1991) 21, 43; N. Piacente, 'Importance of the JCE Doctrine for the ICTY Prosecutorial Policy', 2 *Journal of International Criminal Justice* (2004) 446, 449.

shared intent of the participants.³² Thus, it qualifies the common plan-element as a subjective rather than an objective element of criminal responsibility.³³ Moreover, this reading emphasises the interpersonal nature of the common plan-element: the existence of a common plan depends on the *shared* intention of the *participants* in addition to the *individual* intentions of the *accused*.

In practice, the subjective and interpersonal nature of the common plan are not always clearly articulated. In fact, not much effort seems to be required to establish a common plan in individual cases. In relation to ICTY case law, Van Sliedregt, for example, observes that the *Tadić* Appeals Chamber judgment has ‘left the door open for a broad interpretation [of the common plan element, MC]’.³⁴ In particular, it has allowed the Tribunal to infer the existence of a common plan from the unified actions of a plurality of persons.³⁵ In this respect, ‘a Chamber will almost certainly not inquire into the intent of every single person alleged in the indictment to have been a member of the JCE’.³⁶

The judicial practice to infer the common plan from circumstantial evidence is not considered objectionable *per se*, since direct evidence of the participants’ agreement is often lacking. However, the way in which the courts have used circumstantial evidence has been found problematic insofar as it detracts from the traditional subjective and interpersonal nature of the common plan-element. Haan, for example, objects to the ICTY’s extensive reference to objective circumstances: ‘Die abstrakte Auslegung von “gemeinschaftlich” (jointly) als vorwiegend subjektives Zurechnungselement steht jedoch im Kontrast zu den Kriterien, die in der Rechtsprechung des Jugoslawientribunals bei der Einzelfallprüfung herangezogen werden, ob ein solcher gemeinsamer Vorsatz auch vorgelegen hat.’³⁷ Furthermore, Olásolo criticises the inference of a common plan from the contributions of the accused without taking note of the actions and intentions of other participants.³⁸ He finds that this approach does not sufficiently ensure that there

32 Van Sliedregt (n. 2 above) 101, 138. See also C. Farhang, ‘Point of No Return: Joint Criminal Enterprise in *Brđanin*’, 23 *Leiden Journal of International Law* (2010) 137, 153.

33 E.g. Van der Wilt (n. 1 above) 310 n. 17; Van Sliedregt (n. 2 above) 101; Weigend (n. 6 above) 481. See also *Prosecutor v. Ngudjolo Chui*, Concurring opinion of Judge Christine van den Wyngaert, Case No. ICC-01/04-02/12, 18 December 2012 (Concurring opinion Judge van den Wyngaert), paras. 32–33.

34 Van Sliedregt (n. 2 above) 136.

35 *Tadić* Appeals Chamber judgment, para. 227.

36 G. Boas et al., *International Criminal Law Practitioner Library, Volume I: Forms of Responsibility in International Criminal Law* (New York: Cambridge University Press, 2007) 53. In fact, most Chambers never even identify the members of the JCE. See Chouliaras (n. 22 above) 576; Haan (n. 23 above) 196.

37 Haan (n. 6 above) 256: ‘The abstract interpretation of “jointly” as a primarily subjective element of attribution contrasts with the criteria the ICTY uses in its case-by-case assessment to determine whether a shared intent also existed’ (translation by the author). For a more positive evaluation of this issue, see e.g. Van der Wilt (n. 1 above) 310; Ohlin (n. 6 above) 701; Weigend (n. 6 above) 480–481.

38 Olásolo (n. 16 above) 289.

was a *common* decision between the participants and that the participants *jointly* implemented the common plan.³⁹

To take away some of the controversy surrounding the meaning of the common plan for JCE and joint perpetration and to further clarify the nature of this element, the following sections analyse the case law of the ICTY and the ICC.

3.3 JCE AND THE COMMON PLAN-ELEMENT

3.3.1 *Towards an Objective Common Plan?*

The ICTY qualifies the common plan as an objective element of JCE liability that pertains to the *actus reus* of the accused. The Tribunal interprets the common plan-element as ‘an understanding or arrangement amounting to an agreement between the plurality of persons to commit one or more crimes’.⁴⁰ The agreement does not have to be previously arranged or formulated.⁴¹ It can materialise extemporaneously and may be inferred from the way in which the crimes were committed.⁴² The fact that a plurality of persons acted in unison is particularly relevant in this respect. By reasoning in this way, the ICTY portrays the common plan-element as an interpersonal and subjective concept. It requires that the JCE members acted with a *shared intention* to commit the crimes

³⁹ Olásolo (n. 16 above) 285-290.

⁴⁰ E.g. *Prosecutor v. Kvočka et al.*, Judgment, Case No. IT-98-30/1-A, Appeals Chamber, 28 February 2005 (Kvočka et al. Appeals Chamber judgment), para. 117; *Prosecutor v. Krajišnik*, Judgment, Case No. IT-00-39-T, Trial Chamber I, 27 September 2006 (Krajišnik Trial Chamber judgment), para. 883; *Prosecutor v. Vasiljević*, Judgment, Case No. IT-98-32-A, Appeals Chamber, 25 February 2004 (Vasiljević Appeals Chamber judgment), para. 100; *Tadić* Appeals Chamber judgment, para. 227. This is somewhat different in relation to the systemic form of JCE II. In this form, the common plan is equated to a system of ill-treatment. The participants of the JCE do not need to collectively share the purpose underlying this system of ill-treatment, but only need to have individual knowledge of its criminal purpose and intent to further this purpose. E.g. *Prosecutor v. Krnojelac*, Judgment, Case No. IT-97-25-A, Appeals Chamber, 17 September 2003 (Krnojelac Appeals Chamber judgment), para. 97; Kvočka et al. Appeals Chamber judgment, paras. 118, 209.

⁴¹ E.g. *Prosecutor v. Furundžija*, Judgment, Case No. IT-96-17/1-A, Appeals Chamber, 21 July 2000, para. 119; *Prosecutor v. Gotovina et al.*, Judgment, Case No. IT-06-90-T, Trial Chamber I, 15 April 2011 (Gotovina et al. Trial Chamber judgment), para. 1953; *Prosecutor v. Simba*, Judgment, Case No. ICTR-01-76-A, Appeals Chamber, 27 November 2007, para. 90; *Prosecutor v. Martić*, Judgment, Case No. IT-95-11-T, Trial Chamber I, 12 June 2007 (Martić Trial Chamber judgment), para. 437; *Tadić* Appeals Chamber judgment, para. 227; Kvočka et al. Appeals Chamber judgment, para. 117.

⁴² See e.g. *Prosecutor v. Đorđević*, Judgment, Case No. IT-05-87/1-T, Trial Chamber II, 23 February 2011 (Đorđević Trial Chamber judgment), para. 1862; *Prosecutor v. Martić*, Judgment, Case No. IT-95-11-A, Appeals Chamber, 8 October 2008 (Martić Appeals Chamber judgment), para. 68; *Tadić* Appeals Chamber judgment, para. 227; *Krnojelac* Appeals Chamber judgment, para. 97; *Vasiljević* Appeals Chamber judgment, paras. 100, 109; Kvočka et al. Appeals Chamber judgment, paras. 96, 115-119; *Martić* Trial Chamber judgment, para. 438; *Brđanin* Appeals Chamber judgment, paras. 415, 418.

encompassed by the common plan. However, recent case law concerning the criminal responsibility of senior political and military leaders puts pressure on this conception.

In cases against senior accused, the common plan no longer relates to small-scale mob violence (as in cases against low-level perpetrators),⁴³ but often encompasses national campaigns of ethnic cleansing, e.g. ‘the establishment of an ethnically Serb territory through the displacement of the Croat and other non-Serb population’.⁴⁴ Since the low-level physical perpetrators of crimes generally do not share these broad common plans,⁴⁵ they will often fall outside the scope of the JCE. This does, however, not necessarily absolve senior leaders from criminal responsibility under JCE. According to the *Brđanin* Appeals Chamber, JCE also applies when the indicted crimes have been committed by non-JCE members as long as these crimes ‘can be imputed to at least one member of the joint criminal enterprise, and that this member – when using the principal perpetrator – acted in accordance with the common plan’.⁴⁶ This implies that the JCE concept covers situations in which a small group of senior leaders (JCE members) agrees upon a common plan and uses a number of low-level perpetrators (non-JCE members) to execute it.

Suppose, for example, that senior leaders X and Y agree upon a common plan to ethnically cleanse country C. Following this plan, X orders foot soldier A to forcibly transfer part of the population from village V. Now that X has used A in accordance with the common plan he agreed upon with Y, A’s crimes can be attributed to both X and Y. This practice diminishes the importance of the common plan-element. After all, the link between the senior leader and the physical perpetrator no longer depends on their common plan to commit crimes, but is subject to the leader’s use of the physical perpetrator: X and Y are criminally responsible for the forcible transfer committed by A not because they had a common plan with A, but because X used A to commit this crime. At the same time, the ICTY’s interpretation of JCE potentially enables the

43 The *Tadić* Appeals Chamber describes mob violence as ‘situations of disorder where multiple offenders act out of a common purpose, where each of them commit offences against the victim, but where it is unknown or impossible to ascertain exactly which acts were carried out by which perpetrator, or when the causal link between each act and the eventual harm caused by the victims is similarly indeterminate’. *Tadić* Appeals Chamber judgment, para. 205.

44 *Đorđević* Trial Chamber judgment, para. 2007. Exceptions to this practice are the *Popović* et al. and *Tolimir* cases, in which the prosecution divided the case into a JCE to murder and a JCE to forcibly transfer the population. The common plan is thus inherently linked to the commission of crimes.

45 E.g. *Brđanin* Appeals Chamber judgment, paras. 410-411. See also *Prosecutor v. Krajišnik*, Judgment, Case No. IT-00-39-A, Appeals Chamber, 17 March 2009 (*Krajišnik* Appeals Chamber judgment), para. 156; *Prosecutor v. Tolimir*, Judgment, Case No. IT-05-88/2-T, Trial Chamber II, 12 December 2012 (*Tolimir* Trial Chamber judgment), para. 1040; *Đorđević* Trial Chamber judgment, paras. 2126-2127; *Gotovina* et al. Trial Chamber judgment, paras. 2314-2319.

46 *Brđanin* Appeals Chamber judgment, para. 430. The *Brđanin* Appeals Chamber thus essentially introduced a form of indirect perpetration that covers the vertical relation between a senior JCE member and a low-level operating from outside the JCE. On this judgment, see e.g. Farhang (n. 32 above).

Tribunal to bolster the subjective and interpersonal nature of the common plan-element in relation to senior leaders. After all, it is more realistic to find a shared intent among senior leaders X and Y than to establish that they agreed with the structurally and geographically remote foot soldier A to implement a national campaign of ethnic cleansing.⁴⁷ This bolstering effect has, however, not been realised in practice. Rather than observing the relations between senior leaders in terms of their *subjective shared intent*, the ICTY seems to emphasise their *objective joint action*. Of course, the JCE members' joint action has always been evidentially relevant for establishing shared intent, but it currently appears to play a more independent role.⁴⁸ The following finding of the *Krajišnik* Trial Chamber illustrates this observation:

a common plan alone is not always sufficient to determine a group, as different and independent groups may happen to share identical objectives. Rather, it is the interaction or cooperation among persons – their joint action – *in addition to* their common objective that makes those persons a group. The persons in a criminal enterprise must be shown to act together, or in concert with each other in the implementation of a common objective if they are to share responsibility for the crimes committed through the JCE.⁴⁹

The Trial Chamber further emphasised that

[a] person not in the JCE may share the general objective of the group but not be linked with the operations of the group. Crimes committed by such a person are of course not attributable to the group. On the other hand, links forged in pursuit of a common objective transform individuals into members of a criminal enterprise. These persons rely on each other's contributions, as well as on acts of persons who are not members of the JCE but who have been procured to commit crimes, to achieve criminal objectives on a scale which they could not have attained alone.⁵⁰

47 Olásolo (n. 16 above) 228.

48 Similarly, T. Salomonsen, *Joint Criminal Enterprise as a Way of Attributing International Crimes to Political Leaders*, 3 May 2001, PhD Thesis, on file with author, 99; A. Zahar and G. Sluiter, *International Criminal Law: A Critical Introduction* (Oxford: Oxford University Press, 2007) 256; Haan (n. 6 above) 199. This practice has been criticised, by e.g. Chouliaras (n. 22 above) 565; Boas et al. (n. 36 above) 515.

49 *Krajišnik* Trial Chamber judgment, para. 884 (emphasis added). See also *Prosecutor v. Haradinaj et al.*, Judgment, Case No. IT-04-84-T, Trial Chamber I, 3 April 2008 (*Haradinaj et al.* Trial Chamber judgment), para. 139; *Tolimir* Trial Chamber judgment, para. 889; *Gotovina et al.* Trial Chamber judgment, para. 1954.

50 *Krajišnik* Trial Chamber judgment, para. 1082.

The *Krajišnik* Trial Chamber accordingly considered that the finding of a common plan between the JCE members depends, for example, on whether the perpetrators acted as members of, or were associated with, any organisations connected to the JCE; whether the crimes committed were consistent with the pattern of similar crimes committed by JCE members against similar categories of victims; whether the perpetrators' acts were ratified implicitly or explicitly by members of the JCE; whether the perpetrators acted in cooperation or in conjunction with members of the JCE; whether any member of the JCE made a meaningful effort to punish the perpetrators; and whether the acts were performed in the context of a systematic attack.⁵¹ Note that these circumstances do not relate to the mutual cooperation between the JCE members, but make the finding of a common plan subject to the patterned and systemic commission of crimes and the JCE members' position in, and contribution to, this context of violence.⁵² Thus, it is doubtful to what extent the circumstances can prove the JCE members' *joint* action.

Reasoning along similar lines as the *Krajišnik* Trial Chamber, the *Krajišnik* Appeals Chamber held that 'a JCE can come to embrace expanded crimes, as long as the evidence shows that the JCE members agreed on this expansion of means'.⁵³ This agreement does not require a 'consensus or shared understanding amounting to a psychological causal nexus' among the JCE members.⁵⁴ It is already ascertained when the individual JCE members are informed of the crimes, do nothing to prevent their recurrence, and persist in the implementation of the common objective.⁵⁵ This finding confirms that the ICTY has shifted away from its initial subjective and interpersonal interpretation of the common plan-element and has started to focus on the accused's participation in, and his contribution to, the large-scale commission of crimes instead. The next section further explores this development in light of the ICTY's application of the common plan-element.

3.3.2 *The Common Plan-Element in Practice*

The ICTY case law shows a correlation between the common plan- and the shared intent-element, because the Tribunal often evaluates these elements in combination with each other.⁵⁶ It thereby refers to facts that largely coincide with the circumstances that were listed by the *Krajišnik* Trial Chamber in relation to the finding of a joint action

51 *Krajišnik* Trial Chamber judgment, para. 1081.

52 Similarly, Salomonsen (n. 48 above) 101.

53 *Krajišnik* Appeals Chamber judgment, para. 163.

54 *Krajišnik* Trial Chamber judgment, para. 185.

55 *Krajišnik* Trial Chamber judgment, para. 171.

56 E.g. *Prosecutor v. Popović et al.*, Judgment, Case No. IT-05-88-T, Trial Chamber II, 10 June 2010 (*Popović et al.* Trial Chamber judgment); *Prosecutor v. Stakić*, Judgment, Case No. IT-97-24-A, Appeals Chamber, 22 March 2006 (*Stakić* Appeals Chamber judgment); *Đorđević* Trial Chamber judgment; *Krajišnik* Trial

between the JCE members. They concern (i) the nature of the crimes and the context in which they were committed; (ii) the relations between the participants; and (iii) the attitude and informed contribution of the JCE members to the common plan.⁵⁷

3.3.2.1 Nature of Crimes and Context

In relation to the nature of the crimes and the context in which they were committed, the ICTY *inter alia* refers to the fact that the crimes took place in a politically tense atmosphere, in a discriminatory setting, or in the context of a systematic attack against the population;⁵⁸ that they were committed in a planned, organised, and systemic manner;⁵⁹ that the crimes were discriminatory in nature;⁶⁰ that the commission of crimes was widespread and effective;⁶¹ and that there was a pattern of crimes. To

Chamber judgment; *Tolimir* Trial Chamber judgment; *Martić* Trial Chamber judgment; *Haradinaj* et al. Trial Chamber judgment; *Gotovina* et al. Trial Chamber judgment.

57 Some of the circumstances may be placed under several categories. However, this does not devalue the categorisation, since the factual circumstances acquire a different role in each of the three categories.

58 E.g. *Prosecutor v. Stakić*, Judgment, Case No. IT-97-24-T, Trial Chamber II, 31 July 2003 (*Stakić* Trial Chamber judgment), paras. 470-471, 474-475, 819; *Đorđević* Trial Chamber judgment, para. 2005; *Krajišnik* Trial Chamber judgment, paras. 894-924.

59 Different categories of evidence concerning the planned and organised character of the crimes have been considered relevant. For example, see references to evidence relating to meetings, directives and communiqués (*Đorđević* Trial Chamber judgment, paras. 2112-2117; *Popović* et al. Trial Chamber judgment, paras. 1051-1052, 1060-1061, 1085, 1087; *Gotovina* et al. Trial Chamber judgment, paras. 1970-1996; *Stakić* Trial Chamber judgment, paras. 472, 629; *Tolimir* Trial Chamber judgment, paras. 1010-1012, 1025, 1030; *Haradinaj* et al. Trial Chamber judgment, paras. 629-636); the build up and use of the security, police and armed forces (*Đorđević* Trial Chamber judgment, paras. 2010-2026; *Popović* et al. Trial Chamber judgment, paras. 1057-1058; *Stakić* Trial Chamber judgment, paras. 474, 479; *Krajišnik* Trial Chamber judgment, paras. 931-934; *Tolimir* Trial Chamber judgment, para. 1026); the (dis)armament of the population (*Đorđević* Trial Chamber judgment, paras. 2010-2026; *Stakić* Trial Chamber judgment, para. 475; *Krajišnik* Trial Chamber judgment, paras. 928-929); the creation of an atmosphere of fear (*Stakić* Trial Chamber judgment, para. 476; *Krajišnik* Trial Chamber judgment, paras. 901, 923; *Tolimir* Trial Chamber judgment, paras. 116, 1020-1021, 1031, 1034, 1037); and the creation of circumstances of secrecy (*Popović* et al. Trial Chamber judgment, paras. 1057-1058; *Tolimir* Trial Chamber judgment, para. 1055).

60 At least two types of evidence concerning discrimination have been deemed material. See references to evidence regarding the imposition of discriminatory measures by the leadership with regard to victims (e.g. *Gotovina* et al. Trial Chamber judgment, paras. 1997-2099, 2308; *Popović* et al. Trial Chamber judgment, para. 1052; *Đorđević* Trial Chamber judgment, paras. 2070-2080; *Stakić* Trial Chamber judgment, para. 475; *Krajišnik* Trial Chamber judgment, paras. 902, 1112; *Tolimir* Trial Chamber judgment, paras. 1013-1015, 1049-50, 1054) and the discriminatory character and effect of the crimes (e.g. *Martić* Trial Chamber judgment, para. 445; *Gotovina* et al. Trial Chamber judgment, para. 2308).

61 For instance, see references to evidence of radical demographic changes (e.g. *Đorđević* Trial Chamber judgment, paras. 2003-2006, 2009; *Stakić* Trial Chamber judgment, para. 706; *Krajišnik* Trial Chamber judgment, para. 895) and the commission of a large numbers of crimes on a variety of locations within a short period of time (e.g. *Popović* et al. Trial Chamber judgment, paras. 1050, 1072; *Gotovina* et al. Trial Chamber judgment, paras. 2305, 2307; *Stakić* Trial Chamber judgment, para. 629; *Krajišnik* Trial Chamber judgment, paras. 1093, 1097; *Đorđević* Trial Chamber judgment, paras. 2034-2035; *Tolimir* Trial Chamber judgment, paras. 1038, 1069-1070; *Martić* Trial Chamber judgment, paras. 443-445).

establish such a pattern, the Tribunal refers to the factual similarities between the crimes in terms of their temporal and geographical scope, their nature, the means and methods of attack, and the identity of the victims.⁶²

Together, these circumstances evidence that the crimes were committed pursuant to a plan, rather than randomly. It is, however, questionable whether they also ascertain the *criminal* nature of this plan and illustrate the participants' *common* intention to implement it: does the systematic and widespread commission of crimes, for example, necessarily imply that all participants agreed to a criminal purpose and cooperated with each other to implement this purpose? Moreover, the collection of relevant factual circumstances does not seem to provide a sufficient basis for identifying the persons who participated in the common plan. In this view, it is significant that the Trial Chamber in the *Dorđević* case found that the scale, nature, and structure of the forces involved in the commission of crimes demonstrate 'the existence of a leadership reaching across the political, military and police arms of governments of the FRY and Serbia who were directing and coordinating the events on the ground' and who in this manner implemented a common plan.⁶³ The Trial Chamber's inference is far-reaching and only appears to be legitimate in combination with additional evidence concerning, for example, the active commitment of the accused to the common plan.

3.3.2.2 Relations between Participants

The second category of factual circumstances concerns the relations between the participants. In this respect, the ICTY focuses on the cooperation and coordination between the (members of) political and military institutions that were involved in the planning, execution, and cover-up of crimes.⁶⁴ It particularly refers to facts that show a division of tasks and thus illustrate that (the members of) the implicated bodies each contributed to the common plan in their own way.⁶⁵ Three main characteristics of this evaluation require further attention.

62 E.g. *Popović* et al. Trial Chamber judgment, paras. 1054, 1063-1065, 1072; *Dorđević* Trial Chamber judgment, paras. 2027-2035; *Tolimir* Trial Chamber judgment, paras. 1030, 1034, 1038, 1051-1052, 1057-1058; *Haradinaj* et al. Trial Chamber judgment, paras. 660, 667; *Martić* Trial Chamber judgment, para. 443.

63 *Dorđević* Trial Chamber judgment, para. 2130. Similarly, *Krajišnik* Appeals Chamber judgment, para. 248.

64 E.g. *Dorđević* Trial Chamber judgment, paras. 2027-2034, 2036-2051, 2103-2105; *Popović* et al. Trial Chamber judgment, paras. 1054, 1064-1066, 1068-1071; *Stakić* Trial Chamber judgment, paras. 469, 479; *Krajišnik* Trial Chamber judgment, paras. 904-907, 987-988, 1004-1005; *Tolimir* Trial Chamber judgment, paras. 1038, 1045, 1049, 1053, 1056, 1063, 1066; *Martić* Trial Chamber judgment, para. 443.

65 E.g. *Popović* et al. Trial Chamber judgment, para. 1070; *Krajišnik* Trial Chamber judgment, paras. 904-907; *Dorđević* Trial Chamber judgment, paras. 2036-2051.

First, the ICTY's analysis is not limited to the relations between senior leaders,⁶⁶ but also takes account of the cooperation and coordination between physical perpetrators.⁶⁷ The *Martić* Trial Chamber, for example, found that

[w]idespread acts of violence and intimidation intensified against the non-Serb population and became pervasive throughout the RSK territory from 1992 to 1995. These acts were committed by members of the TO and the police of the RSK, and of the JNA, as well as members of the local Serb population, and created such a coercive atmosphere that the Croat and other non-Serb inhabitants of the RSK were left with no option but to flee.⁶⁸

Whereas this practice complies with the traditional application of JCE to situations of mob violence, it seems inappropriate in cases against senior leaders. In these cases, the remoteness between the physical perpetrators, on the one hand, and the senior leaders, on the other, generally means that the former do not share the broadly formulated common plan endorsed by the latter.⁶⁹ Thus, the physical perpetrators and the senior leaders are not part of the same JCE. Under these circumstances, evidence concerning the relations between the physical perpetrators is in itself irrelevant – or at least insufficient – to establish a common plan between the senior leaders. After all, the cooperation and coordination between non-JCE members does not necessarily prove that the persons who *were* part of the JCE acted with the shared intent to implement a common plan.

Second, the ICTY does not only take account of the *personal* relationships between individual JCE members,⁷⁰ but also refers to the cooperation and coordination between political and military *institutions*.⁷¹ Illustratively, the *Popović* et al. Trial Chamber observed that

there is abundant evidence before the Trial Chamber to establish that this [operation] was a coordinated effort reaching from the VRS Commander and

66 E.g. *Đorđević* Trial Chamber judgment, para. 2051; *Popović* et al. Trial Chamber judgment, paras. 1051-1052, 1060-1061, 1068-1069.

67 E.g. *Martić* Trial Chamber judgment, paras. 443-444; *Đorđević* Trial Chamber judgment, paras. 2027-2031, 2034-2050, 2133; *Popović* et al. Trial Chamber judgment, paras. 1063-1066, 1075; *Tolimir* Trial Chamber judgment, paras. 1017-1018, 1024-1027, 1029, 1031, 1033-1039, 1047, 1054, 1063.

68 *Martić* Trial Chamber judgment, para. 444.

69 See section 3.3.1.

70 See e.g. *Krajišnik* Trial Chamber judgment, para. 919 ('whereas the Accused was a managerial type of comparatively few words, whose key role was to maintain a functioning central authority and an illusion of good governance while a new ethnic reality was being forged on the ground, Karadžić was the ideologue-visionary who gave expression to problems, and legitimisation to solutions, which he had come to presume were on the mind of every Bosnian Serb'). Similarly, *Gotovina* et al. Trial Chamber judgment, paras. 2317-2319; *Popović* et al. Trial Chamber judgment, para. 1068.

71 E.g. *Đorđević* Trial Chamber judgment, paras. 2027-2029, 2036-2051, 2118; *Popović* et al. Trial Chamber judgment, paras. 1064, 1065, 1070; *Krajišnik* Trial Chamber judgment, paras. 1097, 1117.

some members of the Main Staff through the Drina Corps, the MUP and down to the Zvornik and Bratunac Brigades and the Battalions thereof. While the evidence does not permit an exact determination as to who were participants and who were perpetrators, it is clear that individual units from across the VRS worked together in the implementation of the common purpose.⁷²

The *Đorđević* Trial Chamber similarly focused on evidence of institutional cooperation. It even explicitly chose to refrain from making ‘more specific findings about the involvement in or knowledge of other specific senior political, MUP and VJ officials in the concealment of the bodies of Kosovo Albanians killed during the Indictment period, as they have not been specifically charged in this Indictment’.⁷³ This finding implies that it is not essential to know who the other JCE members were and whether they acted in a coordinated way with the accused.⁷⁴ The common plan-element can already be established on the basis of the cooperation between the accused and unidentified members of a political or military institution. Insofar as reference is thereby made to more specific types of cooperation between individuals, this does not so much serve to unravel the personal relations between the participants, but mainly helps to determine the position of the accused within the implicated institutions. As a result of this practice, the common plan-element has become detached from the JCE members’ shared intent. The *Popović et al.* Trial Chamber judgment is illustrative for this development. The Trial Chamber considered that

[t]he only reasonable conclusion available on the evidence is that the killing operation was undertaken pursuant to a pre-conceived, coordinated plan to murder. This plan emanated from the highest echelons of the VRS Main Staff, including Mladic, the Commander of the VRS. The VRS Security Branch planned, organised and implemented the murder operation. The Drina Corps, MUP, Bratunac Brigade and Zvornik Brigade, along with other units detailed above, were also implicated in the murder operation. The Trial Chamber is therefore convinced beyond reasonable doubt that there was a plan involving a plurality of persons to murder the able-bodied Bosnian

72 *Popović et al.* Trial Chamber judgment, para. 1065. Similarly, *Đorđević* Trial Chamber judgment, para. 2128.

73 *Đorđević* Trial Chamber judgment, para. 2119. See also *Popović et al.* Trial Chamber judgment, para. 1065 (‘while the evidence does not permit an exact determination as to who were participants and who were perpetrators it is clear that the individual units of the VRS worked together in the implementation of a common purpose’).

74 Cf Olásolo (n. 16 above) 182.

Muslim males from Srebrenica, and that these persons participated in the common purpose and shared the intent to murder.⁷⁵

At the same time, the Trial Chamber held that there was simply no evidence to find that two of the accused – Borovčanin and Pandurević – shared the intent of the JCE members to commit the crimes falling within the scope of the common plan.⁷⁶ The Chamber therefore acquitted them of the JCE charges and based their conviction on aiding and abetting and superior responsibility instead.⁷⁷

Third, it is noteworthy that the ICTY evaluates whether the participants have worked together in the design, implementation, and execution of a *common plan* rather than in the commission of the specific *crimes* for which the accused stands trial.⁷⁸ The *Stakić* Trial Chamber, for example, based its finding of a common plan on the participants' cooperation in relation to the take-over of power;⁷⁹ the anticipation of a *coup d'état*;⁸⁰ a war;⁸¹ the creation of an atmosphere of fear;⁸² the strengthening and unifying of the military forces;⁸³ and the general mobilisation and the surrender of illegal weapons.⁸⁴ This approach seems appropriate insofar as it portrays the common plan as the central basis for the imputation of crimes.⁸⁵ Furthermore, the Trial Chamber's approach accurately responds to the practical difficulties of establishing the participants' cooperation in relation to each of the hundreds, sometimes thousands, of crimes committed.⁸⁶ At the same time, the Tribunal thus risks creating 'a smokescreen that obscures the possible frail connection between the accused and the specific crimes for which they stand trial'.⁸⁷ This risk is particularly high in cases against senior leaders in which the common plan is generally formulated at a meta-level, for example in terms of a national campaign of ethnic cleansing.⁸⁸ Rather than being the sum of individual crimes, such meta-plans have

⁷⁵ *Popović et al.* Trial Chamber judgment, para. 1072.

⁷⁶ *Popović et al.* Trial Chamber judgment, paras. 1495, 1541, 1966, 2007.

⁷⁷ *Popović et al.* Trial Chamber judgment, paras. 1501, 1563, 1576, 1991, 2012, 2066.

⁷⁸ See e.g. *Martić* Trial Chamber judgment, para. 443; *Gotovina et al.* Trial Chamber judgment, paras. 1971-2009, 2317-2319; *Krajišnik* Trial Chamber judgment, paras. 896-897, 903-909, 919, 924, 952, 954, 992, 1001-1002; *Stakić* Trial Chamber judgment, paras. 473, 475, 479, 481-482, 484, 487, 489.

⁷⁹ *Stakić* Trial Chamber judgment, para. 472.

⁸⁰ *Stakić* Trial Chamber judgment, para. 473.

⁸¹ *Stakić* Trial Chamber judgment, para. 474.

⁸² *Stakić* Trial Chamber judgment, para. 477.

⁸³ *Stakić* Trial Chamber judgment, para. 479.

⁸⁴ *Stakić* Trial Chamber judgment, para. 481.

⁸⁵ Haan (n. 23 above) 174; Salomonsen (n. 48 above) 48-49.

⁸⁶ A. O'Rourke, 'Joint Criminal Enterprise and *Brđanin*: Misguided Overcorrection', 47 *Harvard International Law Journal* (2006) 307, 310; Van Sliedregt (n. 2 above) 182.

⁸⁷ H. van der Wilt, 'Joint Criminal Enterprise: Possibilities and Limitations', 5 *Journal of International Criminal Justice* (2007) 91, 101.

⁸⁸ See section 3.3.1.

an autonomous meaning.⁸⁹ The ICTY's focus on these plans may accordingly loosen the connection between the accused and the crimes for which he is allegedly responsible. For example, the fact that Stakić cooperated with others to take over power (which in itself is not a crime) does not necessarily mean that he agreed or contributed to the commission of murder. To (re-)establish a sufficient connection between the accused and the crimes for which he stands trial, it is important that the ICTY takes account of the participants' cooperation with respect to particular (categories of) crimes. In this light, the distinction made by the *Stanišić and Simatović* Trial Chamber between the JCE members' involvement in certain military operations and political activities, on the one hand, and the contribution of the accused to the commission of crimes, on the other, should be welcomed.⁹⁰

3.3.2.3 Attitude and Informed Contribution of JCE Members

The third category of relevant factual circumstances concerns the ways in which the individual JCE members contributed to the common plan. This includes both the JCE members' *active* support of political and/or military operations (directly or indirectly involving or resulting in the commission of crimes) and their *inaction* or passivity towards the criminal consequences of these operations. For example, it is relevant whether the JCE members participated in the commission of crimes; made discriminatory, hateful, or violent speeches; denied and concealed crimes; failed to prevent or punish the perpetrators of crimes; and failed to investigate crimes.⁹¹

The ICTY assesses the JCE members' active and passive attitudes and contributions in light of their knowledge of the violent context, in particular their knowledge of the commission of crimes.⁹² In establishing the JCE members' knowledge, the Tribunal ascribes a prominent role to their position and participation in (political and military)

89 Similarly, Haan (n. 6 above) 109. In drawing a link between the common plan and the crimes committed, the ICTY has, for example, held that the commission of a certain type of crime is inherent in the execution of the common plan (*Popović et al.* Trial Chamber judgment, paras. 1086-1087; *Krajišnik* Trial Chamber judgment, para. 1097); that the crimes advanced the common plan (*Đorđević* Trial Chamber judgment, para. 2144; *Gotovina et al.* Trial Chamber judgment, paras. 2310-2311); or were at least consistent with the ultimate common purpose (*Stakić* Trial Chamber judgment, para. 475).

90 *Prosecutor v. Stanišić and Simatović*, Judgment, Case No. IT-03-69-T, Trial Chamber I, 30 May 2013 (*Stanišić and Simatović* Trial Chamber judgment), paras. 2310, 2315, 2326, 2330, 2332, 2341, 2345.

91 See e.g. *Krajišnik* Trial Chamber judgment, paras. 896-900, 1090, 1092, 1097, 1099, 1107-1111, 1115-1116, 1119; *Krajišnik* Appeals Chamber judgment, paras. 192-194; *Đorđević* Trial Chamber judgment, paras. 2020, 2024, 2026, 2083-2103, 2107; *Gotovina et al.* Trial Chamber judgment, paras. 2100-2103, 2204-2302, 2306; *Tolimir* Trial Chamber judgment, paras. 1023-1025; *Haradinaj et al.* Trial Chamber judgment, para. 667; *Martić* Trial Chamber judgment, paras. 329-336, 442-443, 445; *Popović et al.* Trial Chamber judgment, para. 1053.

92 E.g. *Krajišnik* Trial Chamber judgment, paras. 891-893; 940, 1024, 1062, 1097-1098, 1100-1114; *Đorđević* Trial Chamber judgment, para. 2024.

institutions that contributed to the common plan. It may, for example, find that the institution in which the accused participated knowingly contributed to the common plan and attribute this informed institutional contribution to the accused.⁹³ Similarly, the Tribunal may establish that a specific JCE member made an informed contribution to the common plan and attribute this informed contribution to other JCE members who participated in the same institution.⁹⁴ Furthermore, the JCE members' institutional position can entail a presumption of knowledge. This means that the ICTY can infer the JCE members' knowledge from their position of authority by assuming that this position necessarily implies the disposition of certain information.⁹⁵ In general, knowledge accordingly becomes easier to establish in relation to persons who held a high position in an institution that was deeply implicated in the design of the common plan than in cases against low-level perpetrators who participated in an institution that was merely marginally involved in the commission of crimes.⁹⁶

3.3.3 *Summary*

As the foregoing discussion has shown, the ICTY establishes the common plan-element on the basis of facts that largely coincide with the circumstances listed by the *Krajišnik* Trial Chamber in relation to the 'joint action' criterion. They concern (i) the nature of crimes and the context in which they were committed; (ii) the relations between participants; and (iii) the attitude and informed contribution of JCE members to the common plan. In applying these circumstances, the Tribunal variously considers the participants' institutional membership, participation, and support. This results in a loosening of the link between the accused and the crimes for which he stands trial.

93 *Krajišnik* Trial Chamber judgment, paras. 940, 1008, 1024, 1062, 1097-1098, 1103-1114.

94 E.g. *Krajišnik* Trial Chamber judgment, paras. 891-893; 1100-1114; *Đorđević* Trial Chamber judgment, para. 2024.

95 *Krajišnik* Trial Chamber judgment, paras. 891-892, 1099, 1115, 1117.

96 Illustratively, the *Popović* Trial Chamber in relation to Borovčanin considered that there was no direct evidence that the accused saw any beatings or killings of prisoners, that he received any reports to that effect, or that he ordered murders. In this light, the Chamber found the mere indirect evidence that Borovčanin's subordinate knew of these beatings and killings and that the accused realised that the prisoners did not get sufficient food and water, insufficient to establish his knowledge of the plan to murder. Conversely, in relation to Beara, the TC did attach significant value to the knowledge of his subordinates. *Popović* et al. Trial Chamber judgment, paras. 1299, 1509-1513. The *Popović* TC's divergent evaluations of the indirect evidence may be related to the accused's different positions and the different manner in which they fulfilled these positions. As the Deputy Commander of the Special Police Brigade of the Republika Srpska, Borovčanin executed less authority than Beara, the Chief of the Administration of Security. Moreover, unlike Beara, Borovčanin did not have a close relation with Mladic, the man who ordered the killing operation, and his subordinates were less directly involved in the killings than Beara's subordinates. *Popović* et al. Trial Chamber judgment, paras. 1202-1204, 1433.

3.4 JOINT PERPETRATION AND THE COMMON PLAN-ELEMENT

3.4.1 *Common Plan: A Contested Concept*

Before the ICC, the common plan is an objective element of joint perpetration that pertains to the accused's *actus reus*.⁹⁷ The common plan-element requires the finding of an agreement between two or more persons.⁹⁸ This agreement does not need to be explicit. Whereas direct evidence of an agreement is 'likely to assist' in demonstrating the existence of a common plan,⁹⁹ the common plan-element may also be inferred from circumstantial evidence concerning the joint perpetrators' concerted action.¹⁰⁰ In this way, the common plan-element excludes uncoordinated crimes from the scope of joint perpetration.¹⁰¹ The ICC's interpretation of the common plan-element seems to underline the subjective and interpersonal nature of this element: the finding of a common plan depends on the *shared understanding* between the joint perpetrators. However, the ICC's recent findings in relation to the element of (mutual) awareness and acceptance – the 'subjective counterpart' of the common plan-element – seem to put pressure on this reading.

Initially, the ICC considered that the element of (mutual) awareness and acceptance requires that the joint perpetrators are *mutually* aware and *mutually* accept that the implementation of the common plan will result in the commission of crimes in the ordinary course of events.¹⁰² The *Lubanga* Pre-Trial Chamber even held that 'it is precisely the co-perpetrators' mutual awareness and acceptance (...) which justifies (a) that the contributions made by the others may be attributed to each of them, including the suspect, and (b) that they be held criminally responsible as principals to the whole crime'.¹⁰³ By contrast, in more recent decisions, the Court deemed it sufficient to

97 *Lubanga* Trial Chamber judgment, para. 981; *Katanga and Chui* confirmation of charges decision, paras. 522-523; *Ruto et al.* confirmation of charges decision, paras. 292, 301; *Muthaura et al.* confirmation of charges decision, para. 297; *Banda and Jerbo* confirmation of charges decision, para. 129; *Bemba* confirmation of charges decision, para. 350.

98 *Lubanga* confirmation of charges decision, para. 343; *Lubanga* Trial Chamber judgment, para. 981; *Katanga and Chui* confirmation of charges decision, para. 522; *Banda and Jerbo* confirmation of charges decision, para. 129.

99 *Lubanga* Trial Chamber judgment, para. 988.

100 *Lubanga* Trial Chamber judgment, para. 188; *Lubanga* confirmation of charges decision, para. 345; *Katanga and Chui* confirmation of charges decision, para. 523; *Banda and Jerbo* confirmation of charges decision, para. 129; *Muthaura et al.* confirmation of charges decision, para. 399; *Ruto et al.* confirmation of charges decision, para. 301.

101 *Lubanga* confirmation of charges decision, para. 343; *Katanga and Chui* confirmation of charges decision, para. 522.

102 *Lubanga* confirmation of charges decision, paras. 361-362; *Katanga and Chui* confirmation of charges decision, para. 533; *Muthaura et al.* confirmation of charges decision, para. 410; *Banda and Jerbo* confirmation of charges decision, para. 159; *Bemba* confirmation of charges decision, para. 370.

103 *Lubanga* confirmation of charges decision, para. 362.

establish that the *accused* was aware and accepted the criminal results of the common plan.¹⁰⁴ For example, the *Lubanga* Trial Chamber concluded that the prosecution only needs to prove that the accused was aware that the implementation of the common plan would result in the commission of crimes in the ordinary course of events.¹⁰⁵ Pursuant to this interpretation, the element of (mutual) awareness and acceptance no longer connects the joint perpetrators to each other. Thus, it cannot provide a sufficient basis for the attribution of the joint perpetrators' contributions to each of them.

In her concurring opinion to the *Ngudjolo Chui* trial judgment, Judge Van den Wyngaert voiced critique against the majority's interpretation of the common plan. She argued that

by turning the common plan into an objective element, the focus of attention has shifted away from how the conduct of the accused is related to the commission of a crime to what role he/she played in the execution of the common plan. (...) By focusing on the realisation of a common plan, the *mens rea* and *actus reus* requirements are now linked to the common plan instead of to the conduct of the actual physical perpetrators of the crime. (...) When this happens, we come dangerously close to treating the mode of criminal responsibility as a crime in itself, instead of as a legal instrument to connect the actions and omissions of an accused to the acts of one or more physical perpetrators.¹⁰⁶

According to Judge Van den Wyngaert, the ICC's objective understanding of the common plan-element is particularly problematic given the fact that the common plan does not have to be inherently criminal,¹⁰⁷ i.e. the commission of crimes does not have to be the overarching goal of the joint perpetrators.¹⁰⁸ It rather suffices to establish that the implementation of the common plan creates a risk that crimes will be committed if events follow their ordinary course.¹⁰⁹ Judge Van den Wyngaert emphasises that the role of the accused in, and his knowledge of, such a *legitimate* common plan provide an insufficient basis for establishing *criminal* responsibility. She therefore pleads for a more subjective approach that establishes the criminal responsibility of joint perpetrators on

104 *Lubanga* Trial Chamber judgment, para. 1018; *Ruto et al.* confirmation of charges decision, para. 333.

105 *Lubanga* Trial Chamber judgment, para. 1018.

106 Concurring opinion Judge Van den Wyngaert, paras. 34-35.

107 Concurring opinion Judge Van den Wyngaert, para. 35; *Lubanga* Trial Chamber judgment, para. 985. For a scholarly critique of this interpretation and its application in practice, see e.g. Weigend (n. 6 above) 485-487; Ambos (n. 12 above) 152.

108 *Lubanga* Trial Chamber judgment, para. 985.

109 *Lubanga* Trial Chamber judgment, para. 984.

the basis of their shared intent. Pursuant to this approach, the common plan is not an independent objective element, but merely evidences the joint perpetrators' shared intent to pursue a criminal purpose.¹¹⁰ According to Judge Van den Wyngaert, this allows for establishing a more precise connection between the accused and the crimes for which he stands trial.

It follows from the above that the ICC's conception of the common plan-element is still somewhat incoherent and contested. In particular, it remains uncertain whether the common plan should be perceived as an objective or a subjective element and whether it requires the joint perpetrators' mutual awareness and acceptance. The next section aims to clarify some of these ambiguities by evaluating the ICC's application of the common plan-element in practice.

3.4.2 *The Common Plan-Element in Practice*

Before analysing the ICC's application of the common plan-element, two caveats must be made. First, the following analysis is based on a limited number of cases, which makes it difficult to establish a definitive line of reasoning on the basis of which conclusive statements on *the* position of the ICC can be made. Second, the ICC has so far delivered only one final judgment in which it applied the concept of joint perpetration: the *Lubanga* trial judgment. Observations on the application of joint perpetration are therefore largely based on Pre-Trial Chamber decisions. Because these decisions are rendered before a comprehensive examination of the facts underlying the charges against the accused, their factual substantiation remains scarce. This makes Pre-Trial Chamber decisions an imperfect source for understanding the ICC's application of the joint perpetration concept. The following evaluation is therefore merely preliminary and may require adjustments in response to future developments.

The ICC case law displays a strong correlation between the common plan- and the (mutual) awareness and acceptance-element: the latter element is regularly inferred from the former.¹¹¹ The finding of a common plan is derived from factual circumstances concerning (i) preparations for the implementation of the common plan; (ii) the

¹¹⁰ Concurring opinion Judge Van den Wyngaert, para. 33.

¹¹¹ See e.g. *Muthaura et al.* confirmation of charges decision, para. 418: 'Mr. Muthaura and Mr. Kenyatta were part of the common plan to commit the crimes charged and satisfy the subjective elements of the crimes makes it unnecessary to address in further detail the requirement that the suspect be aware and accept that implementing the common plan will result in the fulfillment of the material elements of the crime'. See also *Ruto et al.* confirmation decision, para. 348. Even where the Court has autonomously evaluated the element of subjective (mutual) awareness and acceptance, this has not added any unique elements to the concept of joint perpetration. See e.g. *Banda and Jerbo* confirmation decision, para. 159; *Katanga and Chui* confirmation decision, paras. 564-572; *Lubanga* confirmation decision, para. 408, n 555.

relations between joint perpetrators; and (iii) the attitude and informed contributions of joint perpetrators to the common plan.

3.4.2.1 Preparatory Measures

The first category of factual circumstances relates to the adoption of preparatory measures for the implementation of the common plan. The *Lubanga* Trial Chamber in this respect considered that evidence concerning the period before the crimes were committed, will not only ‘assist in establishing a background and the context of events that fall within the timeframe of the charges’,¹¹² but may also be directly relevant and admissible as evidence of the existence of a common plan. Following this consideration, the ICC regularly bases its finding of a common plan on evidence concerning the adoption of preparatory measures, such as the occurrence of meetings during which the joint perpetrators discussed the operation procedure and divided tasks;¹¹³ the creation of political and military organisations; and the issuance of declarations that indicate the views and aims of the joint perpetrators.¹¹⁴ Whereas these circumstances illustrate that the crimes were planned, they do not seem to indicate the ways in which the joint perpetrators cooperated with each another in relation to the (physical) commission of crimes. Furthermore, they do not prove that the joint perpetrators mutually agreed to these crimes. In fact, the ICC’s reference to preparatory measures appears to make the finding of a common plan subject to the organised *design* rather than the organised *execution* of this plan.

3.4.2.2 Relations between Joint Perpetrators

The second category of circumstances addresses the relations between the joint perpetrators – i.e. their contacts, cooperation, and coordination. Four characteristics of the Court’s respective analyses are particularly noteworthy.

First, the ICC limits its evaluation to the contacts and cooperation between the alleged joint perpetrators. Now that the Court mostly restricts the group of joint perpetrators to senior leaders, its analyses have so far not taken account of the contacts and cooperation with or between the physical perpetrators.¹¹⁵ Given the remote position

¹¹² *Lubanga* Trial Chamber judgment, para. 1022.

¹¹³ E.g. *Katanga and Chui* confirmation of charges decision, para. 548; *Banda and Jerbo* confirmation of charges decision, paras. 130-132, 135; *Ruto et al.* confirmation of charges decision, paras. 302-303; *Muthaura et al.* confirmation of charges decision, paras. 301, 308, 312, 335-336, 342, 344, 360.

¹¹⁴ *Lubanga* Trial Chamber judgment, paras. 1112, 1128.

¹¹⁵ E.g. *Prosecutor v. Al-Bashir*, Decision on the Prosecution’s application for a warrant of arrest against Omar Hassan Ahmad Al-Bashir, Case No. ICC-02/05-01/09, Pre-Trial Chamber I, 4 March 2009 (*Al-Bashir* first warrant of arrest decision), para. 42; *Katanga and Chui* confirmation of charges decision, paras. 548, 552; *Lubanga* Trial Chamber judgment, paras. 1043, 1045, 1131; *Ruto et al.* confirmation of charges decision, paras. 302-303; *Muthaura et al.* confirmation of charges decision, paras. 311, 314, 400. The *Banda and*

and role of senior leaders in the commission of international crimes, the cooperation between these leaders mostly relates to their *design* of a common plan and the adoption of *preparatory measures*, rather than their concerted *execution* of the plan and the *physical commission* of crimes.¹¹⁶ The senior leaders' position and participation in an organisation that was deeply implicated in the realisation of the common plan provide an important framework for assessment in this regard.¹¹⁷

Second, the ICC neither identifies each joint perpetrator nor consistently establishes the cooperation between them. The *Lubanga* Trial Chamber in this respect explicitly held that even when 'the evidence fails to establish the exact nature of the relationship between the accused and the alleged co-perpetrators, and whether there was regular contact between any of them', the overall involvement of the accused may still provide a sufficient basis for ascertaining that he was in contact with the alleged joint perpetrators.¹¹⁸ Against this background, the ICC regularly assesses the relations between joint perpetrators in terms of their institutional affiliation.¹¹⁹ The *Ruto et al.* Pre-Trial Chamber, for example, considered that 'Mr. Ruto hosted a series of meetings (...) where other high-ranking *members of the organization*, including politicians, businessmen and former police and military officials, were present.'¹²⁰ Of course, it is possible that this somewhat imprecise institutional approach results from the preliminary stage of the confirmation of charges proceedings. It will therefore be interesting to see how future decisions of the Court will give shape to the relation between the accused's institutional membership and role, on the one hand, and the cooperation between the alleged joint perpetrators, on the other.

Third, the ICC evaluates the relations between joint perpetrators in connection with the common plan, rather than in terms of the crimes they allegedly

Jerbo confirmation of charges decision forms an exception to this practice in holding that at least some troops shared with the commanders the common plan to attack the MGS Haskanita compound. The physical perpetrators are thus incorporated in the common plan. See *Banda and Jerbo* confirmation of charges decision, paras. 134-135.

116 See e.g. *Lubanga* Trial Chamber judgment, paras. 1129-1130, 1132; *Katanga and Chui* confirmation of charges decision, para. 548; *Banda and Jerbo* confirmation of charges decision, paras. 130-131, 135; *Ruto et al.* confirmation of charges decision, paras. 302-303; *Muthaura et al.* confirmation of charges decision, paras. 301-302, 309-311, 314, 333, 400.

117 See e.g. *Muthaura et al.* confirmation of charges decision, paras. 301-302, 311, 314, 334, 341, 360-361, 368; *Katanga and Chui* confirmation of charges decision, paras. 548, 552; *Lubanga* Trial Chamber judgment, paras. 1043, 1054, 1069-1070, 1080-1081, 1109, 1110, 1112, 1116, 1128, 1130-1131, 1134; *Lubanga* confirmation of charges decision, paras. 369, 374-376, 378.

118 *Lubanga* Trial Chamber judgment, para. 1044.

119 E.g. *Banda and Jerbo* confirmation of charges decision, paras. 130-132, 135; *Al-Bashir* first warrant of arrest decision, paras. 42, 116; *Ruto et al.* confirmation of charges decision, paras. 302-303; *Katanga and Chui* confirmation of charges decision, paras. 548, 552; *Lubanga* confirmation of charges decision, para. 377.

120 *Ruto et al.* confirmation of charges decision, para. 302 (emphasis added). Similarly, *Banda and Jerbo* confirmation of charges decision, paras. 130, 132, 135; *Al-Bashir* first warrant of arrest decision, paras. 42, 116.

committed.¹²¹ The *Katanga and Ngudjolo* Pre-Trial Chamber, for example, determined that the two accused met several times to design an attack at Bogoro village (common plan),¹²² without ascertaining that they also specifically discussed or planned the commission of crimes or that they otherwise cooperated in the planning or execution of these crimes. The Chamber merely considered that the commission of pillage, rape, or sexual enslavement followed from the execution of the attack in the ordinary course of events.¹²³

Fourth, the ICC refers to relations between the joint perpetrators that do not directly relate to the scope and content of the common plan or to the commission of crimes.¹²⁴ For instance, the *Lubanga* Trial Chamber took account of the joint perpetrators' contacts and cooperation during previous operations.¹²⁵ In particular, it found that there was strong evidence to support the suggestion that

during the period prior to the confirmation of the charges – specifically in the summer of 2000 – the accused and some of his principal alleged co-perpetrators (...) were jointly involved in organising the training of Hema youths in the context of the mutiny. Mr Lubanga, inter alia, visited the children, liaised with individuals in Uganda to prevent attacks against the mutineers and was involved in the reintegration of the children following their training.¹²⁶

3.4.2.3 Attitude and Informed Contributions of Joint Perpetrators

The third category of factual circumstances relates to the joint perpetrators' support of the common plan – i.e. their attitude and informed contributions to that plan. So far, the ICC has in this respect only referred to the active contributions of joint perpetrators (e.g. orders to attack a village or to obtain weapons, as well as the recruitment, training, and use of child soldiers)¹²⁷ and to their dissemination of hateful

121 E.g. *Katanga and Chui* confirmation of charges decision, para. 548; *Al-Bashir* first warrant of arrest decision, para. 42; *Lubanga* Trial Chamber judgment, para. 1134; *Ruto et al.* confirmation of charges decision, paras. 302-303; *Banda and Jerbo* confirmation of charges decision, paras. 130, 132, 135.

122 *Katanga and Chui* confirmation of charges decision, para. 548.

123 *Katanga and Chui* confirmation of charges decision, paras. 550-551.

124 See e.g. *Lubanga* Trial Chamber judgment, paras. 1067-1068, 1070, 1109-1110, 1130.

125 *Lubanga* Trial Chamber judgment, paras. 1043-1045. Similarly, *Katanga and Chui* confirmation of charges decision, paras. 548, 552.

126 *Lubanga* Trial Chamber judgment, para. 1045.

127 E.g. *Lubanga* confirmation of charges decision, paras. 405, 408 (and n 507); *Lubanga* Trial Chamber judgment, paras. 1057, 1112, 1129, 1131, 1133-1134; *Katanga and Chui* confirmation of charges decision, paras. 553, 564, 569; *Ruto et al.* confirmation of charges decision, paras. 303, 338, 343, 345; *Muthaura et al.* confirmation of charges decision, paras. 305, 334-335, 341, 363, 375-379, 384-396, 400; *Banda and Jerbo* confirmation of charges decision, paras. 154-155, 158-159.

speeches.¹²⁸ For example, the *Ruto et al.* Pre-Trial Chamber attached value to the fact that ‘Mr. Ruto and other members of the organisation said that they would “expel” or “evict” the Kikuyu, Kamba, and Kisii and took an oath “to kill [these, MC] tribes mercilessly”’.¹²⁹

The joint perpetrators’ contributions do not have to be linked directly to the commission of crimes. They may relate more generally to the design, implementation, or execution of the common plan.¹³⁰ The ICC seems to assess these contributions in light of the joint perpetrators’ membership of, and position in, institutions that were somehow involved in the common plan.¹³¹ The *Lubanga* Trial Chamber, for example, considered that ‘the accused as *President of the UPC-RP* endorsed a common plan to build an effective army to ensure the UPC/FPLC’s domination of Ituri, and he was actively involved in its implementation’.¹³²

3.4.3 Summary

This section has shown that the ICC establishes the common plan-element on the basis of circumstances relating to (i) the preparations for the implementation of the common plan; (ii) the relations between joint perpetrators; and (iii) the attitude and informed contributions of joint perpetrators to the common plan. The Court analyses these circumstances in light of the joint perpetrators’ institutional membership, participation, and support. In that way, it loosens the link between the accused and the crimes with which he is charged. This raises the question of whether the accused’s involvement in a *legitimate* common plan provides a sufficient basis for his *criminal* responsibility. I agree

128 E.g. *Lubanga* confirmation of charges decision, para. 405; *Lubanga* Trial Chamber judgment, paras. 1054, 1075, 1122-1124, 1130; *Muthaura et al.* confirmation of charges decision, paras. 311, 334, 342, 413, 415; *Ruto et al.* confirmation of charges decision, paras. 339-340, 341-342. The joint perpetrators’ knowledge of the commission of crimes may be established by their presence at crime sites; their receipt of reports concerning the facts on the ground; communications between the accused and physical perpetrators; the scope of the crimes committed; and the wide acknowledgment of the commission of crimes. See e.g. *Lubanga* confirmation of charges decision, para. 405; *Katanga and Chui* confirmation of charges decision, para. 568.

129 *Ruto et al.* confirmation of charges decision, para. 339.

130 See e.g. *Banda and Jerbo* confirmation of charges decision, para. 154; *Katanga and Chui* confirmation of charges decision, para. 569; *Lubanga* confirmation of charges decision, para. 405.

131 *Lubanga* Trial Chamber judgment, paras. 1051, 1054, 1057, 1070, 1081, 1110-1111, 1130-1131, 1134; *Banda and Jerbo* confirmation of charges decision, para. 159; *Muthaura et al.* confirmation of charges decision, paras. 375, 377-378, 379, 383-384, 387, 392, 396, 400, 413, 415; *Al-Bashir* first warrant of arrest decision, para. 42; *Katanga and Chui* confirmation of charges decision, para. 568; *Lubanga* confirmation of charges decision, paras. 379, 408 (referring to n 507).

132 *Lubanga* Trial Chamber judgment, para. 1134.

with Judge Van den Wyngaert that this question must be answered in the negative and that the ICC's current practice should therefore be viewed critically.

3.5 IMPLICATIONS OF THE CASE LAW ANALYSIS

3.5.1 *The Subjective-Objective Dichotomy in Practice*

The previous sections have shown that the ICTY and the ICC assess the common plan-element on the basis of broadly overlapping categories of factual circumstances relating to the political and military events preceding the commission of crimes, the relations between the participants, and the role of the accused within large-scale criminality. The ICTY and the ICC each describe and use these circumstances in a distinctive manner. For example – unlike the ICTY – the ICC focuses on the adoption of preparatory measures rather than on the widespread, organised, and patterned nature of crimes. Furthermore, the ICC limits its analysis to the (institutional) cooperation between senior leaders and to the joint perpetrators' active contributions to the common plan, whereas the ICTY also takes account of the relations between the physical perpetrators and the JCE members' passive contributions.

Notwithstanding these factual differences, ICTY and ICC case law displays significant parallels at a more abstract and fundamental level. First, both courts consider the relations between the participants in light of their position and role in the implicated political and military *institutions*. Sometimes, they even evaluate the relations between JCE members and joint perpetrators in terms of the cooperation between these institutions. Second, the ICTY and the ICC assess the relations between the participants and the informed contributions they have made in connection to the *common plan* rather than the crimes committed. Third, the courts focus on the *accused's* contribution to and his knowledge of the common plan and do not systematically assess the role and intentions of the other alleged JCE members or joint perpetrators.

These parallels evidence that the ICTY and ICC largely base their finding of a common plan on (i) the cooperation between (the members of) political and military institutions and (ii) the contribution of the accused to (the objectives of) these institutions. In this way, they ascribe an essentially similar meaning to the common plan-element. When observing this similarity in combination with the fact that the common plan is the most distinctive feature of JCE and joint perpetration that forms the basis for the attribution of criminal acts committed by other participants to the accused,¹³³ it

¹³³ See e.g. Van Sliedregt (n. 2 above) 170-171; Van Sliedregt (n. 28 above) 200; Olásolo (n. 16 above) 169; Ambos (n. 28 above) 167.

becomes difficult to maintain that JCE and joint perpetration are based on different rationales. It seems that the dichotomy between the subjective notion underlying JCE and the objective approach of joint perpetration is nominal rather than actual and should therefore not engross future debates on theories of liability.

Moreover, even though the joint perpetration concept has some distinctive features, it is doubtful whether these features provide for a more refined concept of criminal responsibility.¹³⁴ Surely, the ICC's focus on a small group of senior leaders enables the Court to attribute criminal responsibility on the basis of the close cooperation between these leaders. *In theory*, the Court thus seems to be in a better position than the ICTY (that also takes account of the involvement of distant physical perpetrators) to adopt a sophisticated concept of criminal responsibility that precisely defines the contributions and responsibilities of joint perpetrators.¹³⁵ The ICC has, however, not realised this potential *in practice*. In fact, one of the most significant implications of the ICC's application of the common plan-element is the loosening of the relation between the accused and the relevant crimes.

3.5.2 *The 'Meeting of Minds' in Practice*

As noted, the common plan is traditionally characterised as a 'meeting of minds'. This interpretation emphasises the subjective and interpersonal nature of the common plan. The case law analyses, however, illustrate that the ICTY and the ICC adopt a different approach in practice. The courts largely base criminal responsibility on the participants' cooperation within a (criminal) organisation. In particular, they focus on the objective cooperation between political and military institutions and the accused's contribution to (the objectives of) these institutions. In this way, the courts obscure the link between the participants *inter se* and between the accused and the crimes for which he stands trial. It may even be argued that the ICTY and the ICC essentially move JCE and joint perpetration towards 'theories of collective responsibility based on an institutional-participatory or systemic model of responsibility'.¹³⁶ This development requires a reconsideration of the common plan-element and a re-assessment of criminal responsibility for JCE and joint perpetration. The next section seeks to develop this finding further by drawing an analogy with domestic doctrines of criminal responsibility. Without providing a complete or conclusive re-characterisation of JCE and joint perpetration, this analogy offers some important insights that may assist in better understanding these theories of liability.

¹³⁴ See section 3.2.1.

¹³⁵ On the conceptual distinction between the ICTY's institutional approach and the ICC's individual approach, see Ambos (n. 12 above) 161-162.

¹³⁶ Ambos (n. 28 above) 167-168.

3.6 RECONSIDERING THE NATURE OF JCE AND JOINT PERPETRATION

3.6.1 *Autonomous Criminal Responsibility*

The ICTY and the ICC adopt a differentiated model of criminal responsibility.¹³⁷ This model distinguishes between principals who commit a crime and accessories who participate in the crime of a principal by means of, for example, instigation or aiding and abetting. The responsibility of accessories is derivative from – i.e. depends on – the responsibility of the principal.¹³⁸ This dependency is expressed in the principle of *Akzessorietät* or *emprunt de la criminalité*.¹³⁹

The derivative nature of accessorial responsibility can cause problems in situations that involve complex relations between different actors, like cases of international and/or organised crimes.¹⁴⁰ It may then prove difficult to uncover the relations between all participants and to clarify whether and how the accessory contributed to the crime of the principal. In particular, courts may have trouble linking the intellectual perpetrators – the persons who masterminded the crimes from a remote position – to the physical perpetrators. Domestic systems respond to these difficulties by circumventing or diluting the derivative nature of criminal responsibility through autonomous forms of liability. Two approaches are particularly common in this respect.

First, some domestic systems adopt a so-called normative interpretation of (co-) perpetration that extends the category of principals beyond the physical perpetrators to encompass ‘the most responsible’ intellectual perpetrators.¹⁴¹ This extension allows for loosening the intellectual perpetrators’ criminal responsibility from the acts of the physical perpetrator. Although his responsibility is still triggered by the physical commission of a crime, it is primarily based on autonomous criteria of attribution (e.g. the intellectual perpetrators’ control over the crime). Second, domestic systems sometimes introduce liability for participation in a criminal organisation.¹⁴² The German *kriminelle*

¹³⁷ Van Slidregt (n. 2 above) 74.

¹³⁸ M. van Toorenburg, *Medeplegen*, 20 October 1998, PhD Thesis, on file with author, 264; J. de Hullu, *Materieel Strafrecht: Over Algemene Leerstukken van Strafrechtelijke Aansprakelijkheid naar Nederlands Recht* (Deventer: Kluwer, 2009) 423, 444; Van Slidregt (n. 2 above) 67-68; Ambos (n. 12 above) 147; Farhang (n. 32 above) 140. On the specific derivative character of JCE, see e.g. Farhang (n. 32 above) 146-148, 159-161 and *Prosecutor v. Brđanin*, Separate opinion of Judge Meron, Case No. IT-99-36-A, Appeals Chamber, 3 April 2007 (Separate opinion Judge Meron), paras. 6-7.

¹³⁹ Van Slidregt (n. 2 above) 68; Ambos (n. 12 above) 147.

¹⁴⁰ Van Slidregt (n. 2 above) 21, 69; Ambos (n. 12 above) 85; De Hullu (n. 138 above) 155.

¹⁴¹ D. de Jong, ‘Vormen van Strafbare Deelneming’ in J. van der Neut (ed.), *Daderschap en Deelneming* (Deventer: Gouda Quint, 1999) 92; Van Slidregt (n. 2 above) 70; De Hullu (n. 138 above) 155.

¹⁴² Criminal responsibility for participation in a criminal organisation has been incorporated in the penal codes of France, the Netherlands, Belgium, Germany, Austria, and Canada, among others. See Articles 450-1-450-3 Criminal Code (France, *Code pénal*); Article 140 Criminal Code (the Netherlands, *Wetboek van*

Vereinigung, the French *association de malfaiteurs*, and the Dutch *criminele organisatie* exemplify this practice.¹⁴³ These concepts base the accused's criminal responsibility on his participation in a collective criminal enterprise rather than on his contribution to specific crimes. The link between the accused and the crimes committed may accordingly remain somewhat vague and indirect.

A similar development towards the creation of autonomous forms of liability can be witnessed at the international level, albeit more implicitly. On this account, Van Sliedregt has already re-characterised JCE and joint perpetration, noting that

[i]ndirect co-perpetration and JCE liability are dependent upon the crimes physically committed by others. As such these modalities, like traditional modes of liability, have a derivative character. The liability of an indirect perpetrator and participant in a JCE draws on the crime committed by the physical perpetrator. Yet, they differ from traditional modalities in that the link with the physical perpetrator is attenuated. The *crime(s)* triggers liability but the link with the *person* who actually committed the crime is weak.¹⁴⁴

The analysis in the previous sections affirms this finding. The link between the JCE members and joint perpetrators, on the one hand, and the physical perpetrators, on the other, has become rather loose. In this light, there is reason to further explore to what extent JCE and joint perpetration resemble the normative interpretations of (co-)perpetration in domestic law and whether these theories of liability show traits of liability for participation in a criminal organisation.¹⁴⁵

3.6.2 Normative Interpretation of Co-Perpetration

Under a normative interpretation of criminal responsibility, the principal is the person who is 'most responsible' because he or she had decisive influence on the crime, without necessarily physically committing it.¹⁴⁶ This approach 'enables the extension of principal

Strafrecht); Article 322 *et seq.* Criminal Code (Belgium, *Wetboek van Strafrecht*); Article 129 Criminal Code (Germany, *Strafgesetzbuch*); Article 278 Criminal Code (Austria, *Strafgesetzbuch*); Articles 467.1, 467.11-467.13 Criminal Code (Canada).

¹⁴³ Van Sliedregt (n. 2 above) 69.

¹⁴⁴ Van Sliedregt (n. 2 above) 171. The Dutch concept of co-perpetration is the most autonomous form of participation. See, e.g. De Hullu (n. 138 above) 433; De Jong (n. 141 above) 87.

¹⁴⁵ Van Sliedregt (n. 2 above) 75, 78.

¹⁴⁶ Van Sliedregt (n. 2 above) 72.

liability to those who masterminded crimes and thus qualify as intellectual perpetrators'.¹⁴⁷ The normative approach depends on the formulation of specific criteria of attribution that help to determine who exactly is 'most responsible'. In relation to JCE and joint perpetration, the common plan-element seems to qualify as such a criterion of attribution: it forms the basis for the attribution of criminal acts committed by other participants to the accused.¹⁴⁸ The analysis of ICTY and ICC case law illustrates that the courts' application of the common plan-element shows signs of what Hart defines as 'role responsibility'.¹⁴⁹ Role responsibility arises 'whenever a person occupies a distinctive place or office in a social organization, i.e. when he holds authority and performs a role in an organizational structure' that implies specific duties and responsibilities.¹⁵⁰ The ICTY and the ICC accordingly assess the accused's knowledge of, and contribution to, the common plan in light of his social status and position of responsibility.¹⁵¹ This does not mean that they allow for establishing liability on the mere basis of the accused's position. The position and role of the accused influence, but do not control the judicial assessment of his criminal responsibility.

The 'role inspired' interpretation of JCE and joint perpetration enables the ICTY and the ICC to focus on the *accused's* participation in the common plan. This can lead to the loosening of the link between the criminal responsibility of the accused and the actions and intentions of the other participants (physical perpetrators and senior leaders). The fact that the ICTY mostly overlooks the interpersonal relations between the JCE members illustrates this development. Also, the ICC's finding that the (mutual) awareness and acceptance element is satisfied when the *accused* is aware and accepts that the common plan will result in the commission of crimes, moves the Court's evaluations away from the intentions of joint perpetrators other than the accused.¹⁵²

3.6.3 *Participation in a Criminal Organisation*

Since the World War II trials, international criminal courts have developed an aversion to liability for membership of, and participation in, a criminal organisation. In particular

147 Van Sliedregt (n. 2 above).

148 E.g. Van Sliedregt (n. 2 above) 100, 136, 201; Ambos (n. 12 above) 149; Olásolo (n. 16 above) 169.

149 H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Oxford University Press, 2008) 212-214. See also R.S. Downie, 'Responsibility and Social Roles' in P. French (ed.), *Individual and Collective Responsibility: The Massacre at My Lai* (Cambridge, Mass.: Schenkman Publishing, 1972) 70.

150 A. Chouliaras, 'Discourses on International Criminality' in A. Smeulers (ed.), *Collective Violence and International Criminal Justice: An Interdisciplinary Approach* (Antwerp: Intersentia, 2010) 88.

151 See sections 3.3.2 and 3.4.2.

152 See section 3.4.2.

the ICTY has taken pains to differentiate JCE from membership liability.¹⁵³ Indeed, the nature of membership liability differs from criminal responsibility under JCE and joint perpetration. Most importantly, whereas the former is a crime in itself, the latter are forms of participation in a crime, i.e. ways of committing a crime.¹⁵⁴ Even so, JCE and joint perpetration also display important similarities with domestic concepts of participation in a criminal organisation.¹⁵⁵

First, domestic concepts of participation in a criminal organisation ascribe a central position to the organisation. The term 'organisation' implies an enduring – non-incidental – and/or structured collaboration.¹⁵⁶ The organisation also needs to have a *criminal* purpose, i.e. the purpose to commit crimes.¹⁵⁷ In the international context, the role of organisations for establishing criminal responsibility is more implicit. The accused's criminal responsibility under JCE and joint perpetration is ultimately construed in individualistic terms.¹⁵⁸ Nevertheless, the ICTY's and the ICC's focus on senior

153 See e.g. *Prosecutor v. Milutinović et al.*, Decision on Dragoljub Ojdanić's motion challenging jurisdiction – Joint Criminal Enterprise, Case No. IT-99-37-AR72, Appeals Chamber, 21 May 2003, paras. 25-26.

154 Keijzer and van Sliedregt add a nuance to this distinction. They argue that criminal responsibility for membership of a criminal organisation formally bases criminal responsibility on the accused's participation in a criminal organisation rather than on his involvement in the crimes committed. In practice, however, the accused's conviction is established in view of the specific crimes committed. See E. van Sliedregt and N. Keijzer, 'Collectieve Aansprakelijkheid in het Strafrecht' in M.S. Groenhuijsen and J. Simmelink (eds.), *Glijdende Schalen: Liber Amicorum Jaap de Hullu* (Nijmegen: Wolf Legal Publishers, 2003) 237.

155 See also B.F. Keulen, 'Artikel 140 Sr. Vier Internationale Ontwikkelingen en een Begrafenis' in B.F. Keulen et al. (eds.), *Pet af: Liber Amicorum D.H. de Jong* (Nijmegen: Wolf Legal Publishers, 2007) 229; H. van der Wilt, 'Ontwikkeling van Nieuwe Deelnemingsvormen. Ben ik mijn Broeders Hoeder?', 37 *Delikt en Delinkwent* (2007) 138, 142, 155; Van Sliedregt (n. 2 above) 65; Chouliaras (n. 22 above) 573-574.

156 N. Keijzer, *Strafbaarheid van Voorbereidingshandelingen* (Arnhem: Gouda Quint, 1983) 55, 57; A. Kesteloo, *Deelneming aan een Criminele Organisatie. Een Onderzoek naar de Strafbaarstellingen in Artikel 140 Sr* (Nijmegen: Wolf Legal Publishers, 2011) 34-36, 42-44, 148, 156; M. de Vries-Leemans, *Art. 140 Wetboek van Strafrecht: Een Onderzoek naar de Strafbaarstelling van Deelneming aan Misdadorganisaties* (Arnhem: Gouda Quint, 1995) 31-36, 214-215, 252, 255; E. Garçon, *Code Pénal Annoté: Nouvelle Édition Refondue et Mise à Jour par Marcel Rousselet, Maurice Patin, Marc Ancel* (Paris: Recueil Sirey, 1959) 931-932, Articles 265-268, paras. 9-17; H. Rudolphi and J. Wolter, *SK-StGB Systematischer Kommentar zum Strafgesetzbuch* (Köln: Heymann, 2009) 6-7, Article 229, paras. 5-6; Van der Wilt (n. 155 above) 153. Conversely, under the French concept of *association de malfaiteur* the criminal organisation is so broadly formulated that it effectively encompasses all agreements between two or more persons. Consequently, the criminal organisation becomes akin to a criminal conspiracy. R. Parizot, *Responsabilité Pénale à l'Épreuve de la Criminalité Organisée: Le Cas Sympatomatique de l'Association de Malfaiteurs et du Blachiment en France et en Italie* (Paris: LGDJ, 2010) 100-103.

157 Van der Wilt (n. 155 above) 153; Garçon (n. 156 above) 932, para. 18; Keijzer (n. 156 above) 55-58; Kesteloo (n. 156 above) 45-47; Rudolphi and Wolter (n. 156 above) 7-17, Article 229, paras. 7-13; De Vries-Leemans (n. 156 above) 36-49, 215, 250, 252, 256. Some domestic systems limit criminal responsibility for participation in a criminal organisation to specific serious crimes. See e.g. Articles 324bis and 324ter Criminal Code (Belgium) and Article 467.1 Criminal Code (Canada).

158 C. Harding, *Criminal Enterprise, Individuals, Organisations and Criminal Responsibility* (Devon: Willan Publishing, 2007) 243-244; Chouliaras (n. 150 above) 93.

leaders has led to ‘an inquiry into the criminal structures they represent’.¹⁵⁹ The previous case law analysis in this respect illustrates that JCE members and joint perpetrators can be identified on the basis of their institutional affiliation; that the relations between participants are regularly considered at the level of political or military institutions or in light of the participants’ position within these institutions; that the participants’ contributions are connected to their institutional responsibilities; and that the participants’ knowledge is assessed in light of their position within the organisation.¹⁶⁰ Hence,

the route to individual responsibility lies through some significant participation in the activities of an organization. (...) [T]he existence of the organization and the performance of a certain role within the structure of an organization are paramount for purposes of allocating responsibility to the individual in question.¹⁶¹

Second, like domestic forms of participation in a criminal organisation, JCE and joint perpetration draw an indirect link between the accused and the crimes committed. It is generally not required that the accused was directly involved in the commission of crimes.¹⁶² Instead, it only needs to be established that he somehow participated in the design or implementation of a common plan. Now that this plan is often defined at a meta-level, the accused is primarily connected to an organisational policy involving or leading to systemic violence. The relation between the accused and the individual crimes for which he or she stands trial consequently remains rather vague.¹⁶³

Third, JCE and joint perpetration allow for establishing the criminal responsibility of the accused in light of his *personal* contributions to an organisational policy. In practice, it is not required to determine the *mens rea* of all alleged participants, nor is it necessary to comprehensively address their individual tasks and contributions. As a consequence, JCE and joint perpetration depend on ‘an inquiry into a personal attribute of the defendant, at the time of events, not an inquiry into links among persons’.¹⁶⁴ In this sense, they resemble domestic forms of participation in a criminal organisation. Because these domestic concepts require that the organisation as such – rather than its individual

159 K. Ambos, ‘Command Responsibility and *Organisationsherrschaft*: Ways of Attributing International Crimes to the “Most Responsible” in A. Nollkaemper and H. van der Wilt (eds.), *System Criminality in International Law* (Cambridge: Cambridge University Press, 2009) 128-129.

160 See sections 3.3.2.2, 3.3.2.3, 3.4.2.2, 3.4.2.3.

161 Harding (n. 158 above) 243-244.

162 Garçon (n. 156 above) 930, para. 3; Keijzer (n. 156 above) 55, 57-58; Kesteloo (n. 156 above) 149-150, 156-159; Rudolphi and Wolter (n. 156 above) 17-23, Article 229, paras. 14-18; Parizot (n. 156 above) 108; De Vries-Leemans (n. 156 above) 217-218, 256.

163 See also Van der Wilt (n. 155 above) 152-153; Kesteloo (n. 156 above) 58.

164 Zahar and Sluiter (n. 48 above) 244. Similarly, Van der Wilt (n. 87 above) 99-100.

members – has a criminal purpose, they similarly obviate any extensive evaluation of the acts and intentions of the persons who participated in the indicted crimes.¹⁶⁵

3.6.4 *Evaluation*

Considering that JCE and joint perpetration show significant similarities with domestic forms of autonomous criminal responsibility, they can be aptly interpreted as normative forms of co-perpetration that are influenced by the position of the accused and his participation in a (criminal) organisation. This interpretation makes it possible to use JCE and joint perpetration as devices that capture the systemic character of international crimes, thus responding to the demand for ‘a mixed system of individual-collective responsibility in which the criminal enterprise or organisation as a whole serves as the entity upon which the attribution of criminal responsibility is based’.¹⁶⁶

Although practically useful, such a normative approach to JCE and joint perpetration also raises controversies. By evaluating the accused’s criminal responsibility in light of his position and participation in a criminal organisation, JCE and joint perpetration attenuate the relation between the accused and the crimes for which he stands trial.¹⁶⁷ In other words, they do not explain precisely how the JCE members and joint perpetrators are connected to the indicted crimes.¹⁶⁸ This may be acceptable with respect to domestic concepts of participation in a criminal organisation,¹⁶⁹ since these concepts qualify as separate offences. However, JCE and joint perpetration are modes of liability that serve as tools for attributing criminal responsibility for genocide, crimes against humanity, and war crimes to persons who have not physically committed an act of violence.¹⁷⁰ This imposes an obligation on the ICTY and the ICC to evaluate the actions, intentions, and role of the accused in relation to these international crimes.¹⁷¹ When such an evaluation is side-lined or even missing – as in some of the cases discussed in the previous sections – the label that is put on the accused (that of principal perpetrator of international crimes) no longer corresponds to his personal fault.

In my view, there are two ways to solve this issue: (i) by reaffirming the relation between the accused and the crimes for which he stands trial, or (ii) by accepting that

165 Van der Wilt (n. 155 above) 154; Keijzer and Van Sliedregt (n. 154 above) 243; De Vries-Leemans (n. 156 above) 36, 215, 250-251, 253; Kesteloo (n. 156 above) 55-56, 147.

166 Ambos (n. 28 above) 157. Similarly, Haan (n. 6 above) 242-243; Ambos (n. 12 above) 177.

167 Similarly, Van der Wilt (n. 1 above) 172-175; Van der Wilt (n. 87 above) 101.

168 See Van Sliedregt (n. 2 above) 142, 165, 169.

169 But even in this respect, De Hullu warns that the link between the conduct of the accused and the realisation of the criminal purpose should not become too tenuous. De Hullu (n. 138 above) 425.

170 Similarly, Van der Wilt (n. 87 above) 101.

171 Haan (n. 6 above) 266-270; Van der Wilt (n. 155 above) 158; Van der Wilt (n. 87 above) 101.

JCE and joint perpetration establish liability for participation in a (criminal) organisation, rather than for the crimes proper. The first proposal is certainly viable, as scholars such as Ohlin, Van Sliedregt, Weigend, and Haan have already shown.¹⁷² The previous case law analysis, however, suggests that it has not been followed up in practice. Also the second proposal is not likely to be accepted by the ICTY and the ICC, most obviously because the qualification of JCE and joint perpetration as forms of participation in a criminal organisation goes against the text of their Statutes, which characterise JCE and joint perpetration as ways of committing an international crime.¹⁷³ Even so, such a qualification could have significant advantages, since it would enable the ICTY and the ICC to formulate the much-needed restrictions on JCE and joint perpetration.¹⁷⁴ For example, the courts could require that the common plan has a criminal character or that the participants cooperate in a structured and non-accidental manner.¹⁷⁵

Moreover, it is important to realise that the qualification of JCE and joint perpetration as forms of participation in a criminal organisation does not completely trivialise the underlying crimes. The maximum penalty for participation in a criminal organisation may, for example, depend on the finding whether a crime has actually been committed and, if so, what type of crime this was. In this way, the criminal responsibility of the accused remains linked to the crimes to which he contributed, albeit in a more global sense.¹⁷⁶ Also the specific role of the accused in the organisation and his contribution to the crimes committed, can still be taken into account. For example, the maximum penalty for participation in a criminal organisation can be related to the different positions of leaders, executors, and aiders and abettors.

In light of these considerations, it seems apt to recognise explicitly that JCE and joint perpetration at least resemble forms of participation in a criminal organisation. Rather than diluting responsibility for international crimes, this recognition may actually enable the ICTY and the ICC to interpret criminal responsibility in a more honest and transparent way. This will advance a stricter compliance with the principle of personal culpability.

172 J.D. Ohlin et al., 'Assessing the Control-Theory', 26 *Leiden Journal of International Law* (2013) 725, 731-734; Van Sliedregt (n. 2 above) 165, 169; Haan (n. 6 above) 244.

173 Statute for the International Criminal Tribunal for the former Yugoslavia, SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc. S/RES/827 (25 May 1993), as amended by SC Res 1877, UN SCOR, 64th sess, 6155th mtg, UN Doc. S/RES/1877 (7 July 2009), Article 7; Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002), Article 25(3).

174 For a contrary view, see S. Eldar, 'Exploring International Criminal Law's Reluctance to Resort to Modalities of Group Responsibility: Five Challenges to International Prosecutions and their Impact on Broader Forms of Responsibility', 11 *Journal of International Criminal Justice* (2013) 331.

175 Similarly, Van der Wilt (n. 155 above) 157-158.

176 Keijzer and Van Sliedregt (n. 154 above) 241; Keulen (n. 155 above) 242-244.

3.7 CONCLUSIONS

To establish the criminal responsibility of senior leaders for international crimes, the ICTY and the ICC resort to the concepts of JCE and joint perpetration. These two concepts have a similar basis of attribution: the common plan. The case law analysis conducted in this chapter demonstrates that the ICTY and the ICC apply the common plan-element in a similar way. They essentially interpret the common plan as a collective element that hinges on the participants' cooperation in, and their informed contribution to, a (criminal) organisation. Thus, the courts' practice nuances the interpersonal and subjective nature of the common plan and departs from the traditional interpretation of the common plan as a 'meeting of minds'.

Considering the ICTY's and the ICC's substantially similar interpretation of the common plan-element, it cannot be maintained that JCE and joint perpetration are based on different rationales. The assumed objective–subjective dichotomy between these theories of liability is nominal rather than actual and should therefore be banned from the debate on theories of liability. Instead, further attention should be paid to the analogy between JCE and joint perpetration, on the one hand, and domestic forms of autonomous criminal responsibility, on the other. It seems that – similar to domestic forms of normative co-perpetration and participation in a criminal organisation – JCE and joint perpetration emphasise the role responsibility of accused and focus on their position and participation in a (criminal) organisation. The explicit recognition of this kinship will enable the ICTY and the ICC to see these theories of liability for what they are and to apply them in a more confined and intellectually honest way.